OFFICE OF ATTORNEY-GENERAL

Grants of Land Under Water by State of New York, with History and Interpretation Thereof and Other Opinions as to State Water Powers

By
HON. THOMAS CARMODY
Attorney-General

ALBANY
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GRANTS OF LAND UNDER WATER BY STATE OF NEW YORK, WITH HISTORY AND INTERPRETATION THEREOF

DEPARTMENT OF DOCKS AND FERRIES

Pier "A", North River

NEW YORK CITY, *October* 6, 1911.

HON. THOMAS CARMODY, *Attorney-General, State of New York, Albany, N. Y.:*

SIR.— In many of the grants made by the Commissioners of the Land Office to private individuals of lands under water in the vicinity of The City of New York, there are many restrictions. If possible, will you kindly inform this office of your interpretation of the following grants of land under water in connection with the reservations quoted:

1894 FORM OF COMMERCE GRANT.

1. KNOW YE, That, pursuant to resolution of the Commissioners of our Land Office, dated the twenty-seventh day of March, 1902, and for the purpose of promoting the commerce of our said State, by the building upon the premises hereinafter conveyed, of a public dock or docks by the owner or owners of adjacent uplands, and for no other object or purpose whatsoever, and with the reservations and upon the conditions hereinafter mentioned, we have given and granted, and by these presents, do give and grant unto New York Dock Company, its successors and assigns, the land under water, and between high and low water mark, described as follows, to wit:

DESCRIPTION.

And these presents are upon the express condition that the said grantee shall acquire no right, title or interest in or to the above-described premises, unless within five years from the date of these presents, he shall actually appropriate said premises above described to the purposes of commerce by erecting thereon a public dock or docks, and that all of the right, title and interest in and to so much of the above-described premises as are not actually occupied, and covered by said dock or docks and their necessary approaches, shall remain in the said people in the same manner as if these said presents had not been granted, anything herein contained to the contrary notwithstanding.

THE BUFFALO HISTORY MUSEUM

1870 Form of Beneficial Enjoyment Grant.

2. Know Ye, That, pursuant to a resolution of the Commissioners of our Land Office, for the purpose of promoting the Commerce of our said State or for the beneficial enjoyment by the adjacent owner, and for no other object or purpose whatsoever, and with the reservations and upon the conditions hereinafter mentioned, We have given and granted and by these presents do give and grant unto ....., their heirs and assigns, the land formerly under water, and between high and low water mark, described as follows:

Description.

Excepting and Reserving to all and every the said People, the full and free right, liberty and privilege of entering upon and using all and every part of the above described premises, in as ample a manner as they might have done had this power and authority not been given, until the same shall have been actually appropriated and applied to the purposes of Commerce, by erecting a Dock or Docks thereon, or for the beneficial enjoyment of the same by the adjacent owner.

1894 Form of Full Beneficial Enjoyment Grant.

3. Know Ye, That, pursuant to a resolution of the Commissioners of our Land Office, dated the twenty-eighth day of July, 1898, we have given and granted, and by these presents do give and grant unto ....., their heirs and assigns, the land under water and between high and low water mark, described as follows:

Description.

(No Reservations.)

1870 Form of Commerce Grant.

4. Know Ye, That, pursuant to a resolution of the Commissioners of our Land Office, for the purpose of promoting the Commerce of our said State and for no other object or purpose whatsoever, and with the reservations and upon the conditions hereinafter mentioned, We have given and granted, and by these presents do give and grant unto ....., his heirs and assigns, the land under water, and between high and low water mark described as follows, to wit:

Description.

Excepting and Reserving to all and every the said people, the full and free right, liberty and privilege of entering upon and using all and every part of the above described premises, in as ample a manner as they might have done had this power and authority not been given, until the same shall have been actually appropriated and applied to the purposes of Commerce, by erecting a Dock or Docks thereon; And these presents are upon the Express Condition, that if the said ....., his heirs or assigns, shall not, within five years from the date hereof,

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actually appropriate and apply the above described premises to the purposes of Commerce, by erecting a Dock or Docks thereon, and filling in the same, then these presents and everything herein contained shall cease, determine and become void.

1900 Form of Restricted Beneficial Enjoyment Grant.

5. Know Ye, That, pursuant to a resolution of the Commissioners of our Land Office, dated the 28th day of March, 1902, and for the purpose of granting and conveying a restricted beneficial enjoyment in and to the lands under water and between high and low water mark hereinafter described, to ....., the owner of the adjacent uplands, and for no other object or purpose whatsoever, and with the reservations and upon the conditions hereinafter expressed, we have given and granted, and by these presents, do give and grant unto ....., his successors, heirs and assigns the land under water, and between high and low water mark, described as follows:

Description.

Excepting and Reserving to all and every the said people, the full and free right, liberty and privilege of entering upon and using all and every part of the above described premises in as ample a manner as they might have done had this power and authority not been given, always excepting such parts thereof as are actually occupied and covered by structures, docks or buildings of a substantial character, and such parts of said premises as have been actually filled in, and reclaimed from low or marsh land; provided that unless the improvements above named are completed within five years from the date of these presents this grant shall cease, determine and become null and void.

1842 Form of License to Erect Docks.

6. Know Ye, That, pursuant to a resolution of the Commissioners of our Land Office, for the purpose of promoting the Commerce of our said State and for no other object or purpose whatsoever, and with the reservations and upon the conditions hereinafter mentioned, We have given and by these presents do give unto ....., the power and authority to erect any Dock or Docks that shall be necessary to promote the Commerce of our said State, upon the land under water hereinafter described, and the authority to collect from the persons using such Dock or Docks, reasonable and accustomed Dockage, to be regulated by our Legislature, to wit:

Description.

Excepting and Reserving to all and every the said people, the full and free right, liberty and privilege of entering upon and using all and every part of the above described premises, in as ample a manner as they might have done had this power and authority not been given, until the same shall have been actually appropriated and applied to the purposes of Commerce, by erecting a Dock or Docks thereon; And these presents are upon the Express Condition, that if the said ..... or his assigns, shall not,

THE BUFFALO HISTORY MUSEUM

within ten years from the date hereof, actually appropriate and apply the above described premises to the purposes of Commerce, by erecting a Dock or Docks thereon, and filling in the same, then these presents and everything herein contained shall cease, determine and become void.

1851 Form of Beneficial Enjoyment Grant.

7. Know Ye, That, pursuant to a resolution of the Commissioners of our Land Office, for the purpose of promoting the Commerce of our said State and for the purpose of beneficial enjoyment by the grantees hereinafter named, their heirs and assigns, of the land hereinafter described, and with the reservations and upon the conditions hereinafter mentioned, We have given and by these presents do give unto ..... the power and authority to erect any Dock or Docks that shall be necessary to promote the Commerce of our said State, upon the land under water hereinafter described, and the authority to collect from persons using such dock or docks, reasonable and accustomed dockage to be regulated by our Legislature; and we do also hereby grant unto said ....., their heirs and assigns for the uses and purposes aforesaid, all of our right, title and interest of, in and to the land under water or below high water mark, etc.

Description.

Excepting and Reserving to all and every the said People, the full and free right, liberty and privilege of entering upon and using all and every part of the above described premises, in as ample a manner as they might have done had this power and authority not been given, until the same shall have been actually appropriated and applied to the purposes of Commerce, by erecting a Dock or Docks thereon, or used for the purpose of beneficial enjoyment of the same by the grantee hereinabove named, their heirs or assigns; And these presents are upon the Express Condition, that if the said grantees, or their assigns, shall not appropriate and apply the above described premises to the purposes of Commerce, by erecting a Dock or Docks thereon, and filling in the same, or for the purpose of their beneficial enjoyment of the same, then these presents and everything herein contained shall cease, determine and become void.

1870 Form of Beneficial Enjoyment Grant.

8. Know Ye, That, pursuant to a resolution of the Commissioners of our Land Office, for the purpose of promoting the Commerce of our said State or for the beneficial enjoyment by the adjacent owner, and for no other object or purpose whatsoever, and with the reservations and upon the conditions hereinafter mentioned, We have given and granted, and by these presents do give and grant unto ..... and assigns, the land under water, and between high and low water mark, described as follows, to wit:

Description.

Excepting and Reserving to all and every the said People, the full and free right liberty and privilege of entering upon and using all and

THE BUFFALO HISTORY MUSEUM

every part of the above described premises, in as ample a manner as they might have done had this power and authority not been given, until the same shall have been actually appropriated and applied to the purposes of Commerce, by erecting a Dock or Docks thereon, or for the beneficial enjoyment of the same by the adjacent owner.

1886 Special Form of Commerce Grant.

9. Know Ye, That, pursuant to a resolution of the Commissioners of our Land Office, for the purpose of promoting the Commerce of our said State and for no other object or purpose whatsoever, We have given and granted, and by these presents do give and grant unto....., their heirs and assigns, the land under water, and between high and low water mark, described as follows:

Description.

(No Reservations.)

1842 Form of License to Erect Docks.

10. Know Ye, That, pursuant to a resolution of the Commissioners of our Land Office, for the purpose of promoting the Commerce of our said State and for no other object or purpose whatsoever, and with the reservations and upon the conditions hereinafter mentioned, We have given and by these presents do give unto....., the power and authority to erect any Dock or Docks that shall be necessary to promote the Commerce of our said State, upon the land under water hereinafter described and the authority to collect from such persons using such dock or docks, reasonable and accustomed dockage to be regulated by our Legislature.

Description.

Excepting and Reserving to all and every the said People, the full and free right, liberty and privilege of entering upon and using all and every part of the above described premises, in as ample a manner as they might have done had this power and authority not been given, until the same shall have been actually appropriated and applied to the purposes of Commerce, by erecting a Dock or Docks thereon; And these presents are upon the Express Condition, that if the said....., their heirs or assigns, shall not, within five years from the date hereof, actually appropriate and apply the above described premises to the purposes of Commerce, by erecting a Dock or Docks thereon, and filling in the same, then these presents and everything herein contained shall cease, determine and become void.

1870 Form of Beneficial Enjoyment Grant.

11. Know Ye, That, pursuant to a resolution of the Commissioners of our Land Office, for the purpose of promoting the Commerce of our said State or for the beneficial enjoyment by the adjacent owner, and for no other object or purpose whatsoever, and with the reservations and upon the conditions hereinafter mentioned, We have given and granted,

THE BUFFALO HISTORY MUSEUM

and by these presents do give and grant unto....., pursuant to a resolution of the Commissioners of the Land Office, adopted on the twenty-fourth day of June, 1873, his heirs and assigns, the land under water, and between high and low water mark, described as follows:

DESCRIPTION.

EXCEPTING AND RESERVING to all and every the said People, the full and free right, liberty and privilege of entering upon and using all and every part of the above described premises, in as ample a manner as they might have done had this power and authority not been given, until the same shall have been actually appropriated and applied to the purposes of Commerce, by erecting a Dock or Docks thereon, or for the beneficial enjoyment of the same by the adjacent owner.

1892-94 FORM OF FULL BENEFICIAL ENJOYMENT GRANT.

12. To all to Whom these Presents shall come, Greeting:

WHEREAS, The Grantee hereinafter named, being the owner of the uplands adjacent to the lands hereinafter described, has made application to the Commissioners of the Land Office, pursuant to law and the statutes in such case made and provided, for a grant of the lands hereinafter described for the beneficial enjoyment thereof by the adjacent owner. KNOW YE, That, pursuant to a resolution of the said Commissioners of our Land Office adopted June 30, 1892, we have given and granted, and by These Presents do give and grant unto....., his heirs and assigns, the land under water, and between high and low water mark, described as follows, to wit:

DESCRIPTION.

for the beneficial enjoyment of the same by the said adjacent owner, pursuant to the statutes in such case made and provided.

In connection with the granting of permits for construction work, to be done by private individuals upon lands under water granted to them by the Commissioners of the Land Office, there arise a great many questions as to the interpretation of the various grants and the rights of the grantees. It is our earnest desire to protect the rights of the State as well as the city's rights to the lands under water within the limits of the city of New York. One of the principal questions, which arises almost every day, is as to the class of business and the class of construction for the purposes of commerce and for no other purpose whatsoever. These grants sometimes state that a dock or docks must be built thereon, and in most instances a time limit is set in the grant, at the expiration of which the construction must have been completed in order to make it a valid grant after the expiration of such time limit. In connection with such a grant, should this

THE BUFFALO HISTORY MUSEUM

Department grant a permit to the owners or the grantee for the construction of coal hoists, coal pockets, storage bins, stone yard appliances, factory buildings, gas tanks, storage warehouses and amusement buildings, etc.; or should this Department grant a permit for the filling in of such lands under water out to the bulkhead line which is now or may hereafter be established? If this grant is for the purpose of commerce only, what restrictions should we place upon any construction to be placed within the limits of the grant? Also, the time limit having expired, and a dock or docks having been built upon the lands under water so granted, should we allow any new construction or any extensions to old construction in the shape of piers, wharves or otherwise upon the lands under water after the expiration of such time limit contained in the grant; or should the grantee apply to the Commissioners of the Land Office for a new grant?

In connection with a grant issued for the purpose of commerce and for the unrestricted or restricted beneficial enjoyment of the grantee, for what purposes can this Department issue permits for construction upon the lands under water so granted? The same questions as above apply to this kind of a grant.

In connection with a quasi-grant (so-called, see example No. 6, above), the language of the grant purports to give unto John Doe power and authority to erect any dock or docks that shall be necessary to promote the commerce of the State and to collect the reasonable and accustomed wharfage. The interpretation of this so-called grant is in doubt, the Department holding that the grantee has only obtained a license for the building of such docks and that he has no right for extensions or the building of new docks after the expiration of the time limit, if a time limit is contained in the grant; and if no time limit is expressed in the grant, the grantee's rights are curtailed by the establishment by law of a new bulkhead line, if such line should fall within the limits of the so-called grant, and the grantee's rights are not extended if the new bulkhead or pierhead line so established by law should fall without the limits of the grant. Also, the contention arises that such a so-called grant does not convey a fee to the lands covered by any structures erected or any right, title and interest of any kind whatsoever to any of the lands under water not covered by structures actually sufficient for the practical purposes of commerce. Is it necessary for such a so-called grant to be declared void judicially or is it possible that the People of the

THE BUFFALO HISTORY MUSEUM

State of New York, or their successors in title might actually void such a so-called grant by taking physical possession and using such lands under water without such judicial action?

Noting example No. 7, above, does such grant convey to the grantee title in fee simple to the lands under water described in the grant, and if not, what restrictions, if any, should be placed upon the owner or grantee?

In general, the Department desires to be informed as to what restrictions should be placed upon applicants who propose to erect structures upon lands under water granted by the Commissioners of the Land Office so as to protect the rights of the State and city of New York in accordance with the conditions imposed in the various classes of grants.

Finally, in connection with all grants, especially in connection with those which purport to grant only the power to erect docks and structures and those in which no right, title or interest passes until actually occupied by substantial structures, and then only to such parts as are actually occupied, and in connection with those grants which expire by limitation, we desire to be informed as to what would be the rights of the city of New York to the lands under water in front of streets now open in which the city has the fee or easement, or in front of streets now projected.

Trusting that you will be able to aid our efforts to preserve the rights of the State and city in the lands under water within the jurisdiction of this Department, I am,

Yours respectfully,

CALVIN TOMKINS,

Commissioner of Docks.

STATE OF NEW YORK,

OFFICE OF THE ATTORNEY-GENERAL.

THOMAS CARMODY,

Attorney-General.

ALBANY, *November* 8, 1911.

HON. CALVIN TOMKINS, *Commissioner of Docks and Ferries, Pier A, North River, New York City:*

DEAR SIR.— My delay in acknowledging your letter of October 6th, requesting my construction of the very many forms of water

THE BUFFALO HISTORY MUSEUM

grants which have been issued by the Commissioners of the Land Office, has been caused by the apparent necessity before venturing upon any legal opinion of carefully examining and reviewing the various statutes and rules of the Land Board governing water grants and I now enclose the result of my investigation in a sixty-page history of water grants, from 1786 to date.

I find that it would be extremely difficult to arrive at a correct construction of each of the many forms of grants. It would seem, however, that the following views would be sufficient in the greater number of questions that are likely to confront you in the proper construction of water grants in Greater New York.

Under the original law of 1786, the Land Board were authorized to grant lands under water to promote the commerce of the State. The Land Board apparently misconstrued the provisions of this act and for many years thereafter made grants of such lands under water in fee, without any conditions, restrictions or reservations whatever and it was not until 1832, that water grants were made upon condition that the patentee should erect docks and wharves and fill in the lands so granted within a specified period.

In 1835 the Revised Statutes relating to water grants were amended so that thereafter the Land Board should have conferred upon them " no other power than to authorize the erection of such dock or docks, as they shall deem necessary to promote the commerce of this State, and the collection of reasonable and accustomed dockage from persons using such dock or docks." Accordingly in 1839, the Land Board adopted a new form of water grant which did not convey any land, but merely the statutory power to erect docks and collect dockage. The form was varied in 1842, but it was not again until after the passage of Chapter 283 of the Laws of 1850 that the land under water was expressly granted. The Act of 1850 permitted the Commissioners of the Land Office " to grant in perpetuity or otherwise, so much of the lands under the waters of navigable rivers or lakes as they shall deem necessary to promote the commerce of this State, *or proper for the purpose of beneficial enjoyment of the same by the adjacent owner.* This was a radical departure (See Attorney-General Hoffman's opinion of March 16, 1854).

From 1851 until 1857 only two grants were issued by the Land Board for " beneficial enjoyment." In 1857 the form of water grant was changed so that each grant was usually made thereafter and until 1870, " for the purpose of promoting the com-

THE BUFFALO HISTORY MUSEUM

merce of our said State, or for the beneficial enjoyment of the land by the adjacent owner."

In 1870 the Board resolved that thereafter "no grant for beneficial enjoyment shall be made where the Board shall deem it necessary that a grant of such land should be made to promote the commerce of this State." After 1870, grants were made for purposes of commerce in the form numbered 4 in your letter of October 6th and for purposes of beneficial enjoyment in the form numbered 2 in your letter.

During the period from 1870 to 1888 water grants were made in the proportion of about two beneficial enjoyment grants to one for purposes of commerce.

For the legal distinction between commerce grants and those for beneficial enjoyment, I would refer you to the opinion of Attorney-General Rosendale, dated February 13th, 1892, copied in full in enclosed memorandum, and also to Court of Appeals opinion in Thousand Island Steamboat Co. *vs.* Visger, 179 N. Y. 206.

In 1892 the Board authorized a new form of water grant which became known as a *full* beneficial enjoyment grant, conveying the fee without any conditions or reservations whatever, in contradistinction with a restricted beneficial enjoyment grant. This form was slightly changed in 1894. But in 1899, Secretary of State John T. McDonough made a lengthy report to the Land Board (See Proceedings of 1889, p. 187, etc.), in which he took the view that the State held title to lands under water only as trustee for the public and that the Board was unauthorized to grant such lands except for public or quasi-public purposes and the Board in 1900 abolished the form of full beneficial enjoyment grants. Since 1900 water grants have been made only for purposes of commerce or for restricted beneficial enjoyment.

It is my opinion that the patentee under a commerce grant has no authority to erect other than docks or similar structures upon the lands under water and that such a grant does not license him to build factories, stores, or dwellings. In other words, the grant is made strictly for the subservience of commerce by the building of docks alone. The buildings you refer to in your letter, such as coal hoists, coal pockets, storage warehouses, stone yard appliances, factories, gas tanks and amusement buildings, can alone be erected on lands granted for purposes of the beneficial enjoyment of the uplands of the adjacent owner. But see

THE BUFFALO HISTORY MUSEUM

Abbott *vs.* Curran, 98 N. Y. 668, where the Court held that the language in a grant made for commercial purposes only did not impose either a condition precedent or subsequent, or any restriction upon the absolute title.

It should be borne in mind in considering the rights of riparian owners that in the cases of People *vs.* Mould, 37 A. D. 35; Trustees of Town of Brookhaven *vs.* Smith, 188 N. Y. 74, and Barnes *vs.* Midland R. R. Terminal Co., 193 N. Y. 378, the courts have held that every riparian owner has independent of any water grant the common law right to construct a pier from his uplands to reach navigable waters, subject only to such general rules and regulations as Congress or the State Legislature may prescribe for the protection of the rights of the public.

Regarding the grants made under the Act of 1835, I think it is conceded that no lands whatever were granted, but merely a license to build docks.

Section 1957 of the Code of Civil Procedure authorizes the Attorney-General to maintain an action to vacate or annul letters patent granted by the State, where they were obtained by fraud or through mistake, or where the patentee or those claiming under him have done or omitted an act in violation of the terms and conditions upon which the letters patent were granted, or have by any other means forfeited the interest acquired under the same.

It was held in Blakeslee *vs.* B. S. I. Works, 129 N. Y. 160, in N. Y. C. & H. R. R. R. Co. *vs.* Aldridge, 135 N. Y. 92, and in Saunders *vs.* N. Y. C. & H. R. R. R. Co., 144 N. Y. 84, that a grant of land under water cannot be attacked collaterally, but that the same can only be assailed in a direct proceeding to review the action of the Commissioners of the Land Office, or by an action to vacate the patent.

Many other questions will doubtless occur to you arising from these many different forms of water grants, which I think your Corporation Counsel will be prepared to properly advise you on from time to time, as the occasions arise.

Very truly yours,

THOMAS CARMODY,

Attorney-General.

By E. H. LEGGETT,

Land Clerk.

THE BUFFALO HISTORY MUSEUM

HISTORY OF WATER GRANTS.

The Commissioners of the Land Office were created by chapter 60 of the Laws of 1784 — the Board to consist of the Governor, Lieutenant-Governor, Speaker of the Assembly, Secretary of State, Attorney-General, Treasurer and Auditor. They were empowered to direct the disposing and granting of the waste and unappropriated lands within the State — any three of the Commissioners, including the Governor, to be a quorum for the transaction of business. The act provides for the issuance of letters patent for lands to contain conditions for the actual settlement thereof within three years, and for reservation of mines of gold, silver and salt, also of salt lakes and carrying places on water communications. No form of letters-patent was prescribed.

These Commissioners were continued by chapter 66 of the Laws of 1785. This act prescribes the form of letters-patent containing conditions for settlement of lands to be granted by said Commissioners.

By chapter 67 of the Laws of 1786, the Commissioners were continued in office, and that act provides, among other things, for surveys of the unappropriated State lands by the Surveyor-General and for the sale of such lands under the direction of said Commissioners by the Surveyor-General, at public vendue, who is required to issue a certificate of sale to each purchaser, and that upon the production of such certificate with the State Treasurer's receipt in full payment of purchase price, the Commissioners of the Land Office are directed to issue letters-patent for the lands sold to the purchaser. This act also for the first time makes provision for the granting of lands under water in this State, by the following section:

> "That it shall and may be lawful for the said commissioners to grant such and so much of the lands under the water of navigable rivers, as they shall deem necessary to promote the commerce of this State. Provided always that no such grant shall be made in pursuance of this act, to any person whatever, other than the proprietor or proprietors of the adjacent lands. And provided also, that every applicant for such grant shall previous to his or her application give notice thereof by advertisement to be published in one of the newspapers printed in this state for six weeks successively, and shall cause a copy of such advertisement to be put up at the court house of the county in which the lands lay so intended to be applied for, and if there be no court house in the county, then at such place as the said commissioners shall direct."

THE BUFFALO HISTORY MUSEUM

That act further provides:

> "that all letters patent hereafter to be granted, shall be in such words and forms as the said commissioners shall direct and shall contain an exception and reservation, to the people of this state of all gold and silver mines, and shall vest the lands in fee simple."

Chapter 42 of the Laws of 1791 provides that the Governor shall issue letters-patent for certain waste and unappropriated State lands, in such form and words as the Commissioners of the Land Office shall direct, containing an exception and reservation of gold and silver mines to the people of this State.

The first water grant issued by the Commissioners of the Land Office appears to have been one dated December 29, 1786, to Ezra Read of a parcel of land under the water of the Hudson river adjacent and opposite to his land or farm within the limits of the city of Hudson "together with all and singular the rights, hereditaments and appurtenances to the same belonging or in anywise appertaining, to have and to hold the above described and granted premises unto the said Ezra Read, his heirs and assigns, as a good and indefeasible estate of inheritance forever," without exceptions, conditions or reservations of any kind whatsoever.

This form of grant was followed in all the years from 1786 down to the year 1831, with very infrequent conditions.

Chapter 69 of the Laws of 1801 continues as Commissioners of the Land Office, the Governor, Lieutenant-Governor, Speaker of the Assembly, Secretary of State, Attorney-General, Comptroller and Treasurer, and prescribes their powers and duties, in all respects similar to the former act of 1786 as to the matters above noted.

By an act passed April 5, 1803 (3 Webster, 399), the Surveyor-General was added to the Land Commissioners, and it was provided that five of said Commissioners should constitute a quorum, that the Secretary of State shall convene the Board whenever necessary, that the Governor shall preside or in his absence a chairman may be appointed: "And be it further enacted that the consent and approbation of the person administering the government of this State, shall be and hereby is declared to be necessary in order to the validity of every act and proceeding of the said Land Office."

By an act passed April 9, 1805 (4 Webster, 250), the Deputy Secretary of State was declared to be clerk of the Board and that

THE BUFFALO HISTORY MUSEUM

any three instead of five of the Commissioners, of which the Surveyor-General shall be one, shall constitute a quorum for the transaction of business. This act further provides:

> "That the patentee or patentees of all patents hereafter to be issued for lands lying under water, shall cause to be paid before the same shall be issued, to the Secretary, the sum of five dollars for each grant, to be by the said Secretary accounted for, and paid into the treasury quarter yearly, with the other fees of his office."

The 15th section of an act passed April 3, 1807 (5 Webster, 125–130), reads as follows:

> "And whereas for the purpose of duly regulating and constructing slips and *basons*, and for running out wharves and piers, it is essential that the right to the land under water below water mark, should be vested in the corporation of the city of New York.
>
> "Be it therefore further enacted, that it shall and may be lawful for the commissioners of the land office, and they are hereby directed to issue letters patent, granting to the mayor, aldermen and commonalty of the city of New York, and their successors forever, all the right and title of the people of this state, to the lands covered with water, along the easterly shore of the North or Hudson's river, contiguous to and adjoining the lands of the said mayor, aldermen and commonalty, within the said city of New York at and from low water mark and running four hundred feet into the said river from Bestaver's Killetje or river, to the distance of four miles to the north along the easterly shore of the said North or Hudson's river; and also all the land covered with water, along the westerly shore of the East river or sound, contiguous to and adjoining the lands of the said mayor, aldermen and commonalty, at and from low water mark, and extending four hundred feet into the said river or sound, from the north side of Corlear's hook, at the northerly boundary of the lands covered with water, whereof the said mayor, aldermen and commonalty are now seized, to the distance of two miles to the north, along the westerly shore of the said East river or sound: Provided always, that the proprietor or proprietors of the lands adjacent, shall have the pre-emptive right in all grants made by the corporation of the said city, of any lands under water granted to the said corporation by this act."

By an act passed April 7, 1807 (5 Webster, 233), the jurisdiction of said Commissioners was extended "to land under the water of Hudson River, adjacent to the State of New Jersey."

By an act passed March 24, 1809 (5 Webster, 473), the powers of said Commissioners were "extended to the waters adjacent to and surrounding Great Barn Island, in the City and County of New York, and also to the land between high and

THE BUFFALO HISTORY MUSEUM

low water mark on said island: Provided, that no grant made in pursuance of this act shall infringe the rights of the Mayor, Aldermen and Commonalty of the City of New York; and provided, that the navigation of the waters surrounding the said island shall not be affected thereby."

By chapter 11 of the Laws of 1814 (38th Session), passed October 21, 1814, the Governor was exempted from the duty of attending meetings of said Commissioners and the Lieutenant-Governor was authorized to act as chairman.

By chapter 121 of the Laws of 1815, certain other Commissioners, consisting of the Governor, Lieutenant-Governor, Chancellor, Chief Justice of Supreme Court, Secretary of State, Attorney-General and Surveyor-General were authorized to cede to the United States lands and lands under water in Westchester county, in their opinion necessary for the defense and safety of the city and port of New York.

By chapter 199, Laws of 1815, the powers of said Commissioners of the Land Office were "extended to the lands under water on navigable lakes and to the lands under water adjacent to and surrounding Staten Island: Provided, that no grant to be made in pursuance hereof shall interfere with any rights of the corporation of the City of New York, nor extend more than five hundred feet into the water from low water mark."

By an act passed in 1820, page 95, the Commissioners of the Land Office were authorized to grant certain lands under water in the city of Hudson to Robert Center and another, upon payment of the appraised value.

Chapter 30 of the Laws of 1824 provides as follows:

"That it shall and may be lawful for John M'Lallen, his heirs and assigns, to erect in the Cayuga lake, adjoining to his lands, on lot number ninety-nine, in the town of Covert, any wharf or wharves, store-house or store-houses, and to use, occupy and enjoy the same, as also the store-house heretofore erected by him in said lake, and adjoining said land, as fully and absolutely as if the same right had been vested in him by original patent from the state.

II. And be it further enacted, That it shall and may be lawful for the commissioners of the land office, to grant so much of the lands under the waters of the navigable lakes of this state, as they shall deem necessary to promote the commerce of the state, subject to the same conditions, restrictions and provisions, as are contained in the act, entitled 'An Act concerning the commissioners of the land office, and the sale of unappropriated lands,' passed April 6, 1813."

THE BUFFALO HISTORY MUSEUM

By chapter 58 of the Laws of 1826, entitled "An Act relative to Improvements of the City of New York," it was provided:

"That it shall and may be lawful, for the commissioners of the land office, and they are hereby directed to issue letters patent, granting to the mayor, aldermen and commonalty of the city of New York, and their successors forever, all the right and title of the people of this state, to the lands covered with water along the easterly shore of the North or Hudson's river, contiguous to and adjoining the lands of the said mayor, aldermen and commonalty, within the said city of New York, at and from low water mark, and running four hundred feet into the said river, from a point on the easterly shore of said river, four miles north from Bestaver's Killitje, and extending therefrom north along the easterly shore of said river to Spytden Duyvel creek, otherwise called Kingsbridge creek or Harlaem river; and also all the land covered with water along the westerly shore of the East river or Sound, contiguous to and adjoining the lands of the said mayor, aldermen and commonalty, at and from low water mark, and extending four hundred feet into the said river or sound, from a point on the westerly shore of said river or sound, two miles north from Corlaer's Hook, and extending therefrom north along the westerly shore of the said East river or sound, to Spytden Duyvel creek, otherwise called Harlaem river: Provided always, That the proprietor or proprietors of the lands adjacent, shall have the pre-emptive right in all grants made by the corporation of the said city, of any lands under water granted to the said corporation by this act."

Revised Statutes, Part I, Chapter 9, Laws of 1827.

Title V.

Of the Public Lands, and the Superintendence and Disposition Thereof.

Article First.

Of the General Powers and Duties of the Commissioners of the Land Office.

§ 1. The Commissioners of the Land Office shall have the general care and superintendence, of all lands belonging to this State, the superintendence whereof is not vested in some other officer or board. They shall also have power to direct the granting of the unappropriated lands of the State, according to the directions from time to time to be prescribed by law.

§ 2. All the powers now vested or hereafter to be vested in the Commissioners, may be executed by a majority of the board,

THE BUFFALO HISTORY MUSEUM

or by any three of them, if the surveyor-general be one of such three.

* * * * * * * * *

§ 4. The Deputy Secretary of State shall be clerk to the Commissioners, and shall enter the minutes of their proceedings in a book to be provided for the purpose, which shall be kept in the Secretary's office, in proper order, with the papers and documents which may be presented to the board.

§ 5. All letters-patent hereafter to be granted, shall be in such form as the Commissioners shall direct, and shall contain an exception and reservation to the people of this State, of all gold and silver mines.

Article Fourth.

Of Grants of Land Under Water.

§ 66. The commissioners of the land-office shall have power to grant, so much of the lands under the waters of navigable rivers or lakes, as they shall deem necessary, to promote the commerce of this state; but no such grant shall be made to any person, other than the proprietor of the adjacent lands, and every such grant that shall be made to any other person, shall be void.

§ 67. The powers hereby vested in the said commissioners, shall extend to lands under the water of Hudson's river, adjacent to the state of New Jersey; and also to lands under the waters adjacent to and surrounding Great Barn Island, in the city and county of New York; and to the land between high and low water mark on said island; but no grant shall be so made, as to interfere with the rights of the corporation of the city of New York, or to affect the navigation of the waters surrounding the said island.

§ 6. The powers of the commissioners shall also extend to the lands under water, adjacent to and surrounding Staten Island; but no such grant shall be so made as to interfere with any rights of the corporation of the city of New York, or to extend more than five hundred feet into the water, from low water mark.

§ 69. Every applicant for a grant of land under water, shall, previous to his application, give notice thereof, by advertisement, to be published for six weeks successively, in a newspaper printed in the county in which the land so intended to be applied for, shall

THE BUFFALO HISTORY MUSEUM

be situated; and shall cause a copy of such advertisement to be put up on the door of the court house of such county, and if there be no court house in the county, then at such places as the commissioners shall direct.

§ 70. If there be no newspaper published in the county where such land shall lie, the advertisement shall be published in the newspaper that shall be printed nearest to such land.

CHAP. 110.

LAWS OF 1827.

AN ACT in addition to the several Acts relating to the Powers and Duties of the Commissioners of the Land Office, and of the Comptroller.

Passed March 27, 1827.

1. Be it enacted by the People of the State of New York, represented in Senate and Assembly, That in all cases where grants of land have been directed to be made by the commissioners of the land office, upon the performance of any conditions by such grantees, and no time for the performance of such conditions has been prescribed by law, or by the terms of any agreement on the part of the state, it shall be lawful for the commissioners of the land office to fix a reasonable time for the performance of such conditions, not less than one year, and to cause notice thereof to be inserted in the newspapers published by the printer to this State, for at least six weeks, and to transmit a copy of such notice to the persons interested, by mail; and if the said conditions shall not be performed, within the time so limited in such notice the person or persons entitled to any benefit under such grant shall forfeit all right and title in the premises.

At a meeting of the Land Board held November 21, 1831, Stephen Van Rensselaer applied for a water grant, and on motion of the Attorney-General a grant was ordered to be issued to him upon the express condition that if any part of the premises granted shall not within three years from the date of the patent be applied to the purposes of commerce by docking and filling in the same, then the grant and everything therein contained so far as relates to such part shall cease and be of no force or effect. Accordingly letters-patent were issued to Van Rensselaer, containing such a condition. (Book 25, Patents, page 562.)

THE BUFFALO HISTORY MUSEUM

At a meeting of the Board held February 13, 1832, the following form of letters-patent for all grants of land under water to be hereafter made was approved:

"KNOW YE, That for the purpose of promoting the Commerce of this State, and for no other object or purpose, whatsoever, and with the reservation and upon the conditions hereinafter mentioned, we have given, granted and confirmed and by these presents do give, grant and confirm unto.....all that piece or parcel of land under water situate....., together with all and singular the rights, hereditaments and appurtenances to the same belonging, excepting and reserving to ourselves, all gold and silver mines. And also excepting and reserving to all and every the said People the full and free right, liberty and privilege of entering upon and using all and every part of the above described premises in as ample a manner as they might have done had this grant not been made, until the same shall have been actually appropriated and applied to the purposes of commerce, by erecting docks and wharves thereon and filling in the same, to have and to hold the above described and granted premises, subject to the reservations aforesaid, unto the said....., his heirs and assigns forever. Provided nevertheless, and these presents are upon this express condition, that if our said grantee, his heirs and assigns shall not within two years from the date hereof, actually appropriate and apply all and every part of the above described lands to the purpose of commerce, by erecting docks and wharves thereon, and filling in the same, then these presents and everything herein contained shall cease and determine so far as relates to any part of the granted premises which shall not have been so appropriated and applied."

This form of commerce grant remained in use until the year 1839, and during this period no grants of land were made for any other purpose than that of commerce.

By chapter 238 of the Laws of 1833 and chapter 298 of the Laws of 1834, the Land Board was authorized to extend certain water-patents in the Albany basin, at Albany.

Chapter 232 of the Laws of 1835, amended the Revised Statutes relative to grants of lands under water as follows:

CHAP. 232.

LAWS OF 1835.

AN ACT to amend the Revised Statutes relative to grants of land under water. (Passed May 6, 1835.)

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

§ 1. The powers conferred on the commissioners of the land office by article fourth of title fifth, chapter ninth of part first of

THE BUFFALO HISTORY MUSEUM

the Revised Statutes, are hereby extended to lands under water, and between high and low water mark, in and adjacent to and surrounding Long Island, and to all that part of the county of Westchester lying on the East river or Long Island Sound; but no grant shall be made within the boundaries of the city of New York, or interfere with the rights of the corporation of said city.

§ 2. This act or the act referred to in the preceding section, shall confer upon the said commissioners no other power than to authorize the erection of such dock or docks, as they shall deem necessary to promote the commerce of this state, and the collection of a reasonable and accustomed dockage from persons using such dock or docks, and the legislature may at any time regulate the same in such manner as they shall think proper.

§ 3. So much of article fourth of title fifth of chapter ninth of part first of the Revised Statutes as is inconsistent with this act is hereby repealed.

Chapter 380 of the Laws of 1839 authorized the Board to grant certain lands under water in South Bay in the city of Hudson to the Hudson & Berkshire Railroad Company, and section 2 of the act provides as follows:

> "§ 2. Such grants shall be subject to all the provisions of the fourth article of the fifth title of the ninth chapter of the first part of the Revised Statutes, and to the general regulations of the commissioners of the land office; except that no further notice of any application to them shall be necessary, and except also that the time within which such grantees shall be required to appropriate and apply the granted premises to the purposes of commerce, by erecting docks and wharves thereon and filling in the same, shall not be restricted to a period less than ten years from and after the passage of this act."

At a meeting of the Land Board held May 24, 1839, a resolution was adopted rescinding the resolution of February 13, 1832, as to form of water grants, and it was further resolved "that letters-patent granting lands under water in this State shall hereafter be in the following form:"

> "KNOW YE, That, pursuant to a resolution of the Commissioners of our Land Office, for the purpose of promoting the commerce of our said state and for no other object or purpose whatsoever and with the reservations and upon the conditions hereinafter mentioned, we have given and by these presents do give unto ..... the power and authority to erect any dock or docks that shall be necessary to promote the commerce of our said state upon the land under water hereinafter described and the authority to collect reasonable and accustomed dockage from persons using such dock or docks, to wit: .... Excepting and reserving to all

THE BUFFALO HISTORY MUSEUM

and every the said People the full and free right, liberty and privilege of entering upon and using all and every part of the above described premises in as ample a manner as they might have done had this authority not been given until the same shall have been actually appropriated and applied to the purposes of commerce by erecting a dock or docks."

This form continued in use until the year 1842, when on April 6th of that year the Land Board rescinded the resolution of May 24, 1839, and provided that " the following form be and the same is hereby adopted for all letters patent hereafter to be issued for granting leave to erect docks on lands under water in this State: "

" KNOW YE, That, pursuant to a resolution of the Commissioners of our Land Office, for the purpose of promoting the Commerce of our said State and for no other object or purpose whatsoever and with the reservations and upon the conditions hereinafter mentioned, we have given and by these presents to give unto the....., the power and authority to erect any dock or docks than shall be necessary to promote the commerce of our said State, upon the land under water hereinafter described, and the authority to collect from persons using such dock or docks reasonable and accustomed dockage, to be regulated by our Legislature, to wit:..... Excepting and reserving to all and every the said People, the full and free right, liberty and privilege of entering upon and using, all and every part of the above described premises in as ample a manner as they might have done had this power and authority not been given, until the same shall have been actually appropriated and applied to the purposes of commerce, by erecting a dock or docks thereon, and these presents are upon the express condition that, if the said.....or their assigns shall not within .....years from the date hereof actually appropriate and apply the above described premises to the purposes of commerce by erecting a dock or docks thereon, and filling in the same, then these presents and everything herein contained shall cease, determine and become void."

This form was used from 1842 down to 1853 and the number of years inserted in the condition within which the patentee was to erect docks and fill in was for various periods of two, three, five, six and ten years, and occasionally the number of years was left unfilled in by a line drawn through the blank.

By chapter 239 of the Laws of 1843, it was provided:

" § 1. Samuel Bowne and his heirs and assigns may erect, construct and maintain wharves, docks, bulkheads and piers on the land under water in front of his lands in the city of Brooklyn, and such land under water is hereby granted to him for the purpose aforesaid, with power to demand and receive reasonable dockage and wharfage from all persons using the same; but such docks, wharves and bulkheads, shall not extend into the East river beyond the permanent water line or line of bulkhead determined and established by the commissioners appointed under the

THE BUFFALO HISTORY MUSEUM

second section of the act hereby amended, and pursuant to said act; and hereafter and from and after the passage of this act, the commissioners of the land office are hereby authorized to make grants of lands under water in front of lands in the city of Brooklyn, and extending in the East river to the said permanent water line or line of bulkhead, subject to the provisions of the fourth article of title fifth, chapter ninth, of the first part of the Revised Statutes.

§ 2. All the provisions of the third section of the act hereby amended are made applicable to this act."

Chapter 283 of the Laws of 1850 amended sections 66 and 67 of Article IV, of the Revised Statutes of 1827, relating to grants of lands under water, to read as follows:

"§ 1. The commissioners of the land office shall have power to grant in perpetuity or otherwise, so much of the lands under the waters of navigable rivers or lakes, as they shall deem necessary to promote the commerce of this state, or proper for the purpose of beneficial enjoyment of the same by the adjacent owner; but no such grant shall be made to any person other than the proprietor of the adjacent lands, and any such grant that shall be made to any other person shall be void.

§ 2. The powers conferred on the commissioners of the land office by the first section of this act, are hereby extended to lands under water, and between high and low water mark in and adjacent to and surrounding Long Island, and to all that part of the county of Westchester, lying on the East or Hudson river or Long Island sound; but no grant made under this act shall extend beyond any permanent exterior water line, established by law, and nothing contained in this act shall authorize the commissioners of the land office, to grant any lands under water belonging to the mayor, aldermen and commonalty of the city of New York, nor to interfere with any property, rights or franchises of said corporation of the city of New York, or interfere with the rights of the Hudson river railroad company."

Chapter 288 of the Laws of 1851 authorized the Board to grant to the city of Oswego land under water in front of said city.

In pursuance of a resolution of the Land Board at a meeting held August 2, 1851, directing two water grants, "a form of description having been agreed upon and accepted by both parties, and the same being satisfactory to the Commissioners of the Land Office," grants were made to H. D. Talmage and John Schenck, *et al.*, of certain lands under water, in the following form:

"KNOW YE, That, pursuant to a resolution of the Commissioners of our Land Office, for the purpose of promoting the Commerce of our said State and for the purpose of beneficial enjoyment by the grantees hereinafter named, their heirs and assigns of the land hereinafter described and with the reservation and upon the conditions hereinafter mentioned,

THE BUFFALO HISTORY MUSEUM

we have given and by these presents do give unto..... the power and authority to erect any dock or docks that shall be necessary to promote the commerce of our said State, upon the land under water, hereinafter described and the authority to collect from persons using such dock or docks, reasonable and accustomed dockage, to be regulated by our Legislature, and we do also hereby grant unto said....., their heirs and assigns for the uses and purposes aforesaid, all our right, title and interest of, in and to the land under water or below high water mark.....

Excepting and reserving to all and every the said people the full and free right, liberty and privilege of entering upon and using all and every part of the above described premises in as ample a manner as they might have done had this power and authority not been given, until the same shall have been actually appropriated and applied to the purposes of Commerce by erecting a dock or docks thereon or used for the purpose of beneficial enjoyment of the same by the grantees herein above named, their heirs or assigns, And these presents are upon the express condition that if the said grantees or their assigns shall not appropriate and apply the above described premises to the purposes of Commerce by erecting a dock or docks thereon and filling in the same or for the purpose of their beneficial enjoyment of the same, then these presents and everything herein contained shall cease, determine and become void."

This was a beneficial enjoyment grant.

The minutes of the meeting of the Land Board of June 12, 1852, show as follows:

"The title of lands under water shall be given to the riparian owners on the following general principles:

1. When the general line of the shore is parallel to the general line of the channel, then the division lines shall be laid down at right angles to the line of the channel.

2. Where the lines of the channel and of the shore are curving then the division lines shall be laid down giving a frontage on the channel in the proportion which the whole channel frontage bears to the whole shore frontage."

By resolution of the Board adopted July 23, 1853, the resolution of April 6, 1842, prescribing the form of letters-patent, was rescinded, and it was resolved "that the following form be and the same is hereby adopted for all letters-patent hereafter to be issued for granting leave to erect docks on lands under water in this State."

"Know Ye, That, pursuant to a resolution of the Commissioners of our Land Office, for the purpose of promoting the Commerce of our said State, and for no other object or purpose whatsoever, and with the reservation and upon the conditions hereinafter mentioned, we have given and granted and by these presents do give and grant unto.....,

THE BUFFALO HISTORY MUSEUM

his heirs and assigns, *the land under water and between high and low water mark* described as follows, to wit:..... Excepting and reserving to all and every the said People, the full and free right, liberty and privilege of entering upon and using all and every part of the above described premises in as ample a manner as they might have done had this power and authority not been given until the same shall have been actually appropriated and applied to the purposes of commerce, by erecting a dock or docks thereon, and these presents are upon the express condition that if the said....., or their assigns shall not within.....years from the date hereof actually appropriate and apply the above described premises to the purposes of commerce by erecting a dock or docks thereon and filling in the same, then these presents and everything herein contained, shall cease, determine and become void."

At a Land Board meeting, held March 16, 1854, "The Attorney-General submitted the following report:"

"The Attorney-General, to whom was referred the following Resolution of the Assembly, 'Resolved that the commissioners of the Land Office be requested to report at their earliest convenience whether in their opinion the second section of the act of April 10, 1850,' entitled 'An Act to amend the Revised Statutes, relating to grants under water,' repeals the prohibition contained in the act passed May 6, 1835, entitled 'An Act to amend the Revised Statutes relative to grants of land under water,' that no grant shall be made by the Commissioners of the Land Office within the boundaries of the City of New York, or if such prohibition has been repealed or amended by any other act of the Legislature of this State. By order, R. N. Sherman, Clerk, doth respectively report as follows:

"The first section of the act of May 6, 1835, after extending the powers of the Commissioners of the Land Office to certain lands adjacent to and surrounding Long Island, declares 'that no grant shall be made within the boundaries of the City of New York.' The question proposed is, 'Is this prohibition to make grants within the boundaries of the City of New York repealed by the second section of the act of April 10, 1850?'

"The act of 1835 confined the powers of the Commissioners to make such grants as they should deem necessary to promote the *commerce* of this state. The first section of the act of 1850 extends the power of the Commissioners to such grants as they shall deem necessary (not only) to promote the commerce of this state (but also) for the *beneficial enjoyment* of the same by the adjacent owner.

"If the Legislature believed that such extension of the powers of the Commissioners to grant for the beneficial enjoyment by the adjacent owner, was expedient and proper, such belief was of itself a sufficient reason for the passage of the act, without implying an intention on their part to repeal any portion of a pre-existing law. But, the second section of the Art of 1850, after extending the powers of the Commissioners 'to the lands under water and between high and low water

THE BUFFALO HISTORY MUSEUM

mark in and adjacent to and surrounding Long Island and to all that part of the County of Westchester lying on the East or Hudson River or Long Island Sound,' declares that 'nothing contained in this act shall authorize the Commissioners of the Land Office to grant any lands under water belonging to the Mayor, Aldermen and Commonalty of the City of New York, nor to interfere with any property rights or franchises of said corporation of the City of New York, or interfere with the rights of the Hudson River Railroad Company.

"Is the prohibition clause of the Act of 1835, repealed by the Act of 1850? It is not expressly repealed by any repealing word. If repealed at all, it must be only by implication. But the law is hostile to repeals by implication and requires that the language implying repeal should be clearly and palpably inconsistent with that of the original act. Is there such inconsistency or want of harmony in the language used in these two acts? May not they be blended and read in union? May not the two sections be read, as follows?— but no grant shall be made within the boundaries of the City of New York; and nothing contained in this act shall authorize the Commissioners of the Land Office to grant any lands under water belonging to the Mayor, Aldermen and Commonalty of the City of New York, nor to interfere with any property rights or franchises of said corporation of the City of New York, etc.

"In my judgment they may, and being not repealed by repealing words, nor by implication, there being no conflict or inconsistency between them, but the language of both harmoniously blending, I am of the opinion that it was not the intention of the Legislature by the second section of the act passed April 10, 1850, to repeal the prohibition contained in the first section of the act of May 6, 1835, and that the same is not repealed by that or by any other act of the Legislature of this state.

Respectfully submitted,

O. HOFFMAN, Attorney General."

Under a special resolution of the Land Board at a meeting held April 10, 1854, a further condition was imposed that the patentee should commence building the dock or docks within one year from the date of the patent.

At a Land Board meeting held September 28, 1854, "the Secretary of State presented a draft of rules for the direction of persons applying for grants of lands under water, which were adopted and ordered to be printed." (I am unable to find a copy of these rules.)

Between April 25, 1854, and December 24, 1855, the 1842 form of water grants was resumed, adding, however, after the word "legislature" in the first clause of the patent, the words "and we also give and grant unto the said....., his heirs and assigns the land under water and between high and lower water mark described as follows:....."

THE BUFFALO HISTORY MUSEUM

These grants generally contain conditions requiring the appropriation of the lands for the purposes of commerce within five years. Sometimes, however, they were for three, ten or..... years. No special order of the Land Board for the use of this form can be found.

Chapter 529 of the Laws of 1855 authorized a grant of land under water in Westchester county for the purpose of constructing a dock, in the following language:

> "§ 1. Upon satisfactory proof being made to the commissioners of the land office that it will in no way unfavorably affect the navigation of the Harlem river, and that it will not be detrimental to the public interest, the said commissioners are hereby authorized and required to make a grant of land, under the waters of the Harlem river, to John Bussing, of Fordham, in the town of West Farms, in the county of Westchester, and his assigns, who are hereby authorized to build and construct a pier or dock of the width of not more than three rods, beginning at the end or termination of the public highway leading from Fordham, in the said town of West Farms, to Berrian's Landing near Kingsbridge, on the Harlem river, and extending into said river not over three hundred feet; said pier or dock to be used as a public pier or dock; and the said Bussing and his assigns are hereby authorized to charge and receive such rates of storage and dockage as shall be fixed by the county judge of Westchester county; said rates to be fixed on the first Monday of January next after the completion of said pier, and on the first Monday in January in every third year thereafter.
>
> § 2. This grant shall continue to the said Bussing and his assigns forever; subject, however, to the right of the town authorities of the town of West Farms, upon being authorized and directed by a majority of the electors thereof, voting by ballot at any regular town election, to purchase the said pier or dock, upon their paying to the said Bussing or his assigns, the cost of said pier or dock, with the interest thereon, to be computed at ten per cent. per annum, and upon the condition that the said pier or dock shall be perpetually maintained thereafter as a public pier or dock, for the free use of the people of said town."

In the early part of 1856, six commercial grants were made on the following form; although there was no apparent order of the Land Board, authorizing the use of this form:

> "KNOW YE, That, pursuant to a resolution of the Commissioners of our Land Office, for the purpose of promoting the Commerce of our said State and for no other object or purpose, whatsoever, and with the reservation and upon the conditions hereinafter mentioned we have given and granted and by these presents do give and grant unto....., his heirs and assigns, the land under water and between high and low water mark hereinafter described and also the power and authority to erect any dock or docks that shall be necessary to promote the Commerce of our State upon the same, and the authority to collect from per-

THE BUFFALO HISTORY MUSEUM

sons using such dock or docks, reasonable and accustomed dockage, to be regulated by our Legislature, to wit:.....

Excepting and reserving to all and every the said People, the full and free right, liberty and privilege of entering upon and using, all and every part of the above described premises in as ample a manner as they might have done had this power and authority not been given, until the same shall have been actually appropriated and applied to the purposes of commerce, by erecting a dock or docks thereon, and these presents are upon the express condition that, if the said..... or their assigns shall not within.....years from the date hereof actually appropriate and apply the above described premises to the purposes of commerce by erecting a dock or docks thereon, and filling in the same, then these presents and everything herein contained, shall cease, determine and become void."

From 1857 to 1869, commerce grants were made in the following form:

"KNOW YE, That, pursuant to a resolution of the Commissioners of our Land Office, for the purpose of promoting the Commerce of our said State, and for no other object of purpose whatsoever, and with the reservations and upon the conditions hereinafter mentioned, we have given and granted and by these presents do give and grant unto....., his heirs and assigns, the land under water and between high and low water mark, described as follows, to wit:.....

Excepting and reserving to all and every the said People, the full and free right, liberty and privilege of entering upon and using, all and every part of the above described premises in as ample a manner as they might have done had this power and authority not been given, until the same shall have been actually appropriated and applied to the purposes of commerce, by erecting a dock or docks thereon, and these presents are upon the express condition that, if the said..... or their assigns shall not within..... years from the date hereof actually appropriate and apply the above described premises to the purposes of commerce by erecting a dock or docks thereon, and filling in the same, then these presents and everything herein contained, shall cease, determine, and become void."

By resolution of the Land Board of November 7, 1857, the Attorney-General reported amendments to the usual form of letters-patent for grants of land under water, so that "patents made out for beneficial enjoyment in the future shall be in the following form:

(Same as last above, excepting that in first paragraph after the words "Commerce of our said State," are interlined the words "or for the beneficial enjoyment of the land by the adjacent owner." And in the second clause, after the words "applied to the purposes of Commerce" are interlined the words "or for the beneficial enjoyment of the same by the adjacent owners," and the words "by erecting a dock or docks

THE BUFFALO HISTORY MUSEUM

thereon," stricken out. After the words "premises to the purposes of Commerce" are interlined the words "or for the beneficial enjoyment of the same by the adjacent owner," and the words "by erecting a dock or docks thereon and filling in the same," stricken out. (.....years.)

This form was continued in use from 1857 to 1870, with the following exceptions: That on June 29, 1858, a grant was made for full beneficial enjoyment without any exceptions, reservations or conditions whatever to one, Charles T. Cromwell, and in 1869 a grant was made in the following form:

"KNOW YE, That, pursuant to a resolution of the Commissioners of our Land Office, for the purpose of the beneficial enjoyment by the adjacent owner and for no other object or purpose whatsoever, and with the reservations and upon the conditions hereinafter mentioned, we have given and granted and by these presents do give and grant unto..... ..... his heirs and assigns, the land under water and between high and low water mark, described as follows, to wit:

Excepting and reserving to all and every the said People the full and free right, liberty and privilege of entering upon and using all and every part of the above described premises in as ample a manner as they might have done had this power and authority not been given, until the same shall have been actually appropriated and applied to the purposes of commerce or for the beneficial enjoyment of the same by the adjacent owner by erecting a dock or bulkhead or filling in the same."

Chapter 397 of the Laws of 1866 confirms a grant made by the Commissioners of the Land Office to Cheney Ames and his associates, of certain lands under water in the city of Oswego, under an act passed March 23, 1854, and it is provided:

"If said grantees or their assigns shall fail to build upon or in front of said land a pier or breakwater in addition to any built by the United States, within ten years from the passage of this act, the said land shall revert to the People of the State."

Chapter 196 of the Laws of 1869 authorized the Land Board, whenever they have power to make a grant of land, summarily to inquire into the rights of any party thereto, upon such proof as by regulation they shall prescribe, "but this act shall not apply to grants of land under water."

On February 11, 1870, the Land Board passed the following resolution:

"The Lieutenant-Governor presented the following Report:

To the Commissioners of the Land Office.

The undersigned, having been appointed a Committee to revise the rules and regulations of the Board governing applications for water grants and the form of water grant Patents, respectfully report that they recommend the adoption of the following resolutions:

THE BUFFALO HISTORY MUSEUM

I. RESOLVED, That the Resolution adopted by this Board September 28, 1854, be amended by adding after the word 'owner' where it first occurs, the words 'specifying which,' so that said Resolution will read as in the directions hereto annexed.

II. RESOLVED, That the Resolution adopted by this Board July 2, 1861, be and is hereby amended by inserting between the words 'Propriety of making such grant or grants' and the word 'and' the following: 'With their opinion whether such grant is necessary to promote the commerce of this State or for the beneficial enjoyment of the adjacent owner, or both. And no grant for beneficial enjoyment shall be made where the Board shall deem it necessary that a grant of such land should be made to promote the Commerce of this State,' so that said Resolution shall read as in the 'Directions' hereto annexed.

III. RESOLVED, That the form of Grants for the purpose of promoting Commerce, now in use, be continued without change or modification, which form is hereto annexed, marked 'A.'

IV. RESOLVED, That form of Grants for 'Beneficial Enjoyment' now in use be changed as follows — in the first line after the words 'Excepting and Reserving' insert next after the word 'Commerce' the words 'by erecting a dock or docks thereon' and strike out all after the word 'owner' in the next line to and including the word 'void,' so that such grant shall read as in the form of Grant hereto annexed, marked 'B.'

RESOLVED, That the Clerk of this Board be and he is hereby requested to cause to be printed the Rules and Regulations of the Board as amended.

All of which is respectfully submitted.

Feb. 9, 1870.

ALLEN C. BEACH,

VAN R. RICHMOND.

On motion, the Report was adopted, together with the Resolutions therein contained."

So that from 1870 to the year 1900 many grants of lands were made in the following form:

KNOW YE, That, pursuant to a resolution of the Commissioners of our Land Office, for the purpose of promoting the Commerce of our said State or for the beneficial enjoyment by the adjacent owner, and for no other object or purpose whatsoever, and with the reservations and upon the conditions hereinafter mentioned, WE, have given and granted and by these presents do give and grant unto....., their heirs and assigns, the land formerly under water, and between high and low water mark, described as follows:

Excepting and Reserving to all and every the said People, the full and free right, liberty and privilege of entering upon and using all and every part of the above described premises, in as ample a manner as they might have done had this power and authority not been given, until the same shall have been actually appropriated and applied to the purposes of Commerce, by erecting a Dock or Docks thereon, or for the beneficial enjoyment of the same by the adjacent owner.

THE BUFFALO HISTORY MUSEUM

Commerce grants were made from 1870 to 1887 in the following form:

> KNOW YE, That, pursuant to a resolution of the Commissioners of our Land Office, for the purpose of promoting the Commerce of our said State and for no other object or purpose whatsoever, and with the reservations and upon the conditions hereinafter mentioned, WE have given and granted and by these presents do give and grant unto....., his heirs and assigns, the land under water, and between high and low water mark, described as follows, to wit:
>
> (DESCRIPTION.)
>
> EXCEPTING AND RESERVING to all and every the said People, the full and free right, liberty and privilege of entering upon and using all and every part of the above described premises, in as ample a manner as they might have done had this power and authority not been given, until the same shall have been actually appropriated and applied to the purposes of Commerce, by erecting a Dock or Docks thereon: And these presents are upon the EXPRESS CONDITION, that if the said....., his heirs or assigns, shall not, within five years from the date hereof, actually appropriate and apply the above described premises to the purposes of Commerce, by erecting a Dock or Docks thereon, and filling in the same, then these presents and everything herein contained shall cease, determine and become void."

Chapter 382 of the Laws of 1870, making further provisions for the government of the county of New York, prescribes as follows by section 41:

> "* * * The Commissioners of the Land Office are hereby authorized and directed to convey, by proper instruments in writing, necessary for the purpose, all the property, right title and interest of the People of the State of New York in and to the land under water used and taken by the said board for the construction of wharves, docks, piers, bulkheads, basins and slips under this act, whenever said commissioners may be required by said board to make such conveyance to the mayor, aldermen and commonalty of the city of New York."

By chapter 625 of the Laws of 1881, sections 1 and 2, it is provided:

> "SECTION 1. All patents of lands heretofore issued pursuant to resolutions of the Commissioners of the Land Office, and sold by them at private sale to purchasers in good faith, purporting to convey the right, title and interest of the people of this State in and to any lands in this State, are hereby ratified and confirmed, to as full an extent as though the same had been sold at public auction, according to law; provided the same does not refer to any lands under water in the bay or harbor of New York or adjacent thereto.
>
> § 2. This act shall not be construed to affect any existing suit, or to impair, release or discharge any right, claim or interest of any person in and to said lands."

THE BUFFALO HISTORY MUSEUM

In the years 1886 and 1887 a few unconditional letters-patent were issued upon the advice of Attorney-General O'Brien, where the lands under water applied for had already been applied to purposes of commerce and were already filled in. (See Book 18 Patents, pp. 138, 213, 296, 334 and 370).

By chapter 279 of the Laws of 1888,

> "all the right, title and interest which the People of the State of New York have, if any, in and to the lands outside of and below low water mark under the waters of Huntington Bay, in the town of Huntington, Suffolk County, southerly of a line drawn from a granite monument now set near high water mark on the northerly point of Eaton's Neck and West of the United States Life Saving Station to a locust monument now set on Lloyd's Neck which line runs on a course S. 59° 20′ 25″ West and which is the line claimed by the trustees of the town of Huntington as the northerly line of their grants under Colonial patents, is hereby ceded to the present trustees of the town of Huntington, Suffolk County, and their successors in office, for the purpose of oyster cultivation. Provided nothing in this act shall be held to interefere with the rights and powers of the Commissioners of the Land Office to grant, all the right, title and interest of the State to lands under water in said bay, to the owners of adjacent uplands for purposes of commerce or beneficial enjoyment, and nothing, herein contained shall be construed as interfering with the rights of riparian owners. Subject, however and without prejudice to the legal rights, if any, of such persons as now have oysters planted on the lands aforesaid."

In 1887 and 1888 quit-claim letters-patent were issued to various individuals, containing the words "and these presents shall in no wise operate as a warranty of title," because certain towns who had remonstrated against the grants, claimed title under colonial grants to the lands under water, and it was deemed proper to make quit-claim grants so as to give the patentees a standing in court.

A grant made in 1891 to George Shields of property in Bath Beach, Kings county, contained the following unusual condition:

> "Upon the express condition that the town of New Utrecht and the authorities thereof as well as the traveling public shall at all times have full power and free right of way and ingress to and egress from the waters of Gravesend Bay, over and upon 19th Avenue, whenever the same shall have been extended from Cropsy Avenue to said Bay, by proper legal proceedings, and that the patentee, his heirs and assigns, shall not, at any time, erect, construct or cause to be erected or constructed, any gates, bars or other obstructions to prevent such passage, ingress or egress as aforesaid, or in any way or manner prevent the free and perfect use and connection by said avenue, when extended, with the water of said bay, and in case of such obstruction or violation of said

THE BUFFALO HISTORY MUSEUM

conditions, this patent shall be null and void and the land hereby granted shall revert to and become vested in the People of the State of New York."

In 1871 a grant was made to the mayor, aldermen and commonalty of the city of New York of certain lands under the waters of the Hudson river in fee without conditions or reservations, under chapter 137 of the Laws of 1870, and chapter 574 of the Laws of 1871.

In 1879 another grant was made in fee to the mayor, aldermen and commonalty of the city of New York to lands under the waters of Lake Mahopac, Putnam county, under chapter 445 of the Laws of 1877, and in 1888 a grant was made to the mayor, aldermen and commonalty of the city of New York under chapter 410 of the Laws of 1882 in fee for the construction of wharves, docks, piers, bulk-heads, basins, slips and streets for public use, and for no other objects and purposes whatever, all the right, title and interest of the people in certain lands under water of Long Island sound, Bronx kills, Harlem river, Cromwell's creek, Spuyten Duyvil creek and the Hudson river, with certain exceptions.

On February 13, 1892, Attorney-General Rosendale made the following report to the Land Board in the matter of the application of the Rockaway Park Improvement Company:

"In the matter of the application of The Rockaway Park Improvement Company for correction of letters-patent heretofore issued to said Company, which said application was referred to me, together with the general question as to a revision of the form of patents 'for beneficial enjoyment' I have the honor to report as follows:

The correction applied for is to erase from the letters-patent the following clause: 'Excepting and reserving to all and every the said People, the full and free right, liberty and privilege of entering upon and using all and every part of the above described premises, in as ample a manner as they might have done had this power and authority not been given, until the same shall have been actually appropriated and applied to the purposes of Commerce, by erecting a Dock or Docks thereon, or for the beneficial enjoyment of the same by the adjacent owner.' The petitioner asks that the amended letters-patent shall be without limitation of any kind or in any event, beyond a provision that the title shall become absolute when the lands granted have been appropriated and applied for the beneficial enjoyment of the same by the grantee.

Authority is given to your Honorable Board to make corrections in letters-patent in case of manifest error, by the provisions of chapter 605 of the Laws of 1881.

THE BUFFALO HISTORY MUSEUM

The particular grant in question to the petitioner, was made on the 11th of February, 1890, the Attorney General certifying that the application was made in proper form, the State Engineer and Surveyor reporting that the grant would not interfere with navigation, and the Comptroller reporting that an appraisal had been made valuing the land at $1,015.97; upon which reports the Board directed the grant to be made upon payment of the said appraised value, together with the sum of $54.20, appraiser's fee and expenses. (See proceedings of Commissioners of the Land Office, of 1890, pages 65 and 66.)

The application was for 'beneficial enjoyment,' the grant was directed to be made 'for beneficial enjoyment,' and the full appraised value of the land was paid.

My learned predecessor was at one time called upon for an interpretation of the meaning of the words 'for beneficial enjoyment' as used in the statute, and in an opinion dated September 11th, 1891, he employed the following language:

'By section 67, Vol. 1, of the Revised Statutes, First Edition, page 208, part 1, chapter 9, title 5, article 4, "the Commissioners shall have power to grant so much of the lands under the waters of the navigable rivers and lakes as they shall deem necessary to promote the commerce of the State."

'This statute was amended in 1835, chapter 232, section 2 of said act provided that the Revised Statutes, *supra*, or this act shall confer "no other power upon the commissioners than to authorize the erection of such dock or docks as they shall deem necessary to promote the commerce of the state, and the collection of reasonable and accustomed dockage from persons using such dock or docks, and the legislature may at any time regulate the same, as they shall think proper."

'It would appear that under the conditions of the statute, a grant by the Commissioners of the Land Office for commercial purposes would only authorize the erection of docks on the land granted in such number or style as would promote the commerce of the State, authorizing the grantee to collect reasonable dockage from persons using the docks, the power always remaining in the legislature to regulate the same. By the amendment of section 67, R. S., *supra*, in 1850, chapter 283, which conferred power upon the Land Board to make grants "for beneficial enjoyment," the legislature assumed that grants for purposes of commerce were of a limited character and subject to legislative control. On the other hand, a grant for "beneficial enjoyment" to a grantee, his heirs and assigns, imports a fee, and I think the Legislature by said amendment of 1850 when it authorized the Land Board to make grants for beneficial enjoyment, intended a fee should be conveyed where the land applied for was not necessary for purposes of commerce. (See Resolution adopted by Land Office, March 6th, 1872.)

'The practice of the Land Board in fixing the consideration of these grants has been uniform. In the cases of grants for commerce, only a nominal sum has been charged, whereas in grants for beneficial enjoyment the full appraisal value has been required.'

Without expressing opinion as to the proper construction and meaning of the clause in the particular Patent complained of and sought to

THE BUFFALO HISTORY MUSEUM

be eliminated, it would seem to me that the petitioner should have the relief applied for. The clause can have no place or purpose in the letters-patent, except as a limitation of the grant, and any such limitation is inconsistent with the purpose of the grant.

The lands were applied for, the matter considered by the Board, the valuation made by the appraiser, and payment made by the applicant of the full appraised value, all on the theory that a fee was to be obtained.

I would therefore recommend that the prayer of the petitioner in this matter be granted, and that on surrender and cancellation of the letters-patent issued to it under the resolution of February 11th, 1890, quit-claim letters-patent be issued to said The Rockaway Park Improvement Company for the same premises, but without any limitation or restriction other than a statement that said grant is made 'for the beneficial enjoyment of the adjacent owner' according to the provisions of law; and I would further recommend that all future grants 'for beneficial enjoyment' made in consideration of the payment as purchase price of the full appraised value of the premises, be made in similar manner and form.

(Signed) S. W. ROSENDALE,
Attorney General."

And by resolution of the Land Board on February 25, 1892, new letters-patent were issued to said company without any limitation or restriction other than the statement that said grant was made "for the beneficial enjoyment of the adjacent owners."

The following new form of beneficial enjoyment grant was used from March, 1892, to May 31, 1894:

"WHEREAS, the grantee hereinafter named, being the owner of, the uplands adjacent to the lands hereinafter described, has made application to the Commissioners of the Land Office, pursuant to law and the statutes in such case made and provided, for a grant of the lands hereinafter described for the beneficial enjoyment thereof by the adjacent owner. KNOW YE, that, pursuant to a resolution of the said Commissioners of our Land Office, adopted 189 , we have given and granted and by these presents do give and grant unto ..... his heirs and assigns, the land under water and between high and low water mark, described as follows: ....., for the beneficial enjoyment of the same by the said adjacent owner, pursuant to the statutes in such case made and provided."

The Land Board in 1894 passed the following resolutions:

"The following rules and regulations governing applications for grants of land under water were presented:

RULES AND REGULATIONS OF THE COMMISSIONERS OF THE LAND OFFICE GOVERNING APPLICATIONS FOR GRANTS OF LANDS UNDER WATER.

Resolved 1. That no grants of land under water be hereafter made unless the applicant make affidavit that he intends forthwith to appropriate the lands applied for to the purposes of commerce, by erecting

THE BUFFALO HISTORY MUSEUM

thereon a public dock or docks, or that the land is proper for the purpose of beneficial enjoyment of the owner, specifying *which*, and stating *in what manner* the said enjoyment will be beneficial, and shall also produce an affidavit from the first judge of the county, or the supervisor and town clerk, or two of the assessors of the town in which such lands are situate, stating that the lands applied for are not more than are necessary for the purposes aforesaid and that they believe that it is the *bona fide* intention of the applicant to appropriate the said lands to the purposes of commerce by erecting thereon a public dock or docks, or that they believe that the land is proper for the purpose of the beneficial enjoyment of the same by the owner, and stating the manner in which said enjoyment will be beneficial.

2. That this Board will not act on any application for lands under water unless the same be accompanied with accurate maps of the lands applied for, as hereinafter provided, and by a full and accurate description of the same.

3. That no grants for beneficial enjoyment shall be made when the Board shall deem it necessary that the grant of such lands should be made to promote the commerce of the State.

4. That the minimum sum to be charged to the patentee, in each case of a grant of land under water, be fixed at fifty dollars, in addition to the patent fee of five dollars, for each separate parcel of land under water applied for.

5. That all applications made to this Board for grants of land under water for beneficial enjoyment shall be referred to the Comptroller, under whose direction the value of the lands or privileges applied for shall be appraised by a duly sworn appraiser of the Board, and that the patent shall issue only on payment of the value so reported or such sum as the Board shall, under all circumstances, deem reasonable.

6. That letters-patent for the purposes of beneficial enjoyment shall be of two distinct forms, to be known as 'full' and 'restricted.' (See blank Patents hereunto annexed.) And appraisals of land to which letters-patent of the full form are desired shall be for the full value of such property, while in case of restricted grants, the diminution of the value of the grant to the applicant, by reason of the restrictions imposed, is to be considered in said appraisal.

7. That if, for good and sufficient reasons, a grantee for the purposes of commerce has been unable to comply with the conditions of the letters-patent, he may file with the Commissioners a verified petition, praying that he be granted an extension of not more than three years, within which to comply with the said conditions; but no such prayer shall be granted unless it shall appear that said grantee has actually begun the erection of a public dock or docks, and intends in good faith to complete the same, and his petition must be presented before the expiration of five years from the date of his patent.

8. That in no case will a further extension of time within which to comply with conditions of letters-patent be granted.

9. That all notices of applications for grants of land under water shall state that any person deeming himself liable to injury by reason of such grant may file with the Commissioners of the Land Office a

THE BUFFALO HISTORY MUSEUM

remonstrance, stating why said grant will be an injury to him or his property, and that said remonstrance should be filed on or before the filing of the application.

10. That all letters-patent shall conform to the blank forms hereunto annexed.

11. That the following requirements must be strictly observed in making applications and that all affidavits must be made upon the blanks hereunto annexed.

FORM FOR PURPOSES OF COMMERCE.

(This form has been continued and is in present use, 1911.)

THE PEOPLE OF THE STATE OF NEW YORK, BY THE GRACE OF GOD, FREE AND INDEPENDENT.

To all to Whom these Presents Shall Come, Greeting:

Know ye, that, pursuant to resolution of the Commissioners of our Land Office, dated the day of , 189 , and for the purposes of promoting the commerce of our said State, by the building upon the premises hereinafter conveyed, of a public dock or docks by the owner or owners of the adjacent unlands, and for no other object or purpose whatsoever, and with the reservations and upon the conditions hereinafter mentioned we have given and granted and by these presents do give and grant unto heirs and assigns, the land under water and between high and low water mark, described as follows, to wit:

And, these presents are upon the express condition that the said grantee, shall acquire no right, title or interest in or to the above described premises, unless within five years from the date of these presents, he shall actually appropriate said premises above described to the purposes of commerce by erecting thereon a public dock or docks, and that all of the right, title and interest in and to so much of the above-described premises as are not actually occupied and covered by said dock or docks and their necessary approaches, shall remain in the said people in the same manner as if these presents had not been granted, anything herein to the contrary notwithstanding.

In testimony whereof, we have caused these our letters to be made patent, and the Great Seal of our State to be hereunto affixed.

Witness, Governor of our said State, at our city of Albany, the day of in the year of our Lord one thousand eight hundred and ninety-

Passed the Secretary's office the day of 189 .

.....

Deputy Secretary of State.

FORM FOR FULL AND BENEFICIAL ENJOYMENT.

THE PEOPLE OF THE STATE OF NEW YORK, BY THE GRACE OF GOD, FREE AND INDEPENDENT.

To all to Whom these Presents Shall Come, Greeting:

Know ye, that, pursuant to a resolution of the Commissioners of our Land Office, dated the day of , 189 , we have

THE BUFFALO HISTORY MUSEUM

given and granted, and by these presents do give and grant unto , heirs and assigns, the land under water, and between high and low water mark, described as follows, to wit:

In testimony whereof, we have caused these our letters to be made patent, and the Great Seal of our said State, to be hereunto affixed. Witness, Governor of our said State at our city of Albany, the day of in the year of our Lord, one thousand eight hundred and ninety-

Passed the Secretary's office the day of 189 .

.....

Deputy Secretary of State.

FORM FOR RESTRICTED BENEFICIAL ENJOYMENT.

THE PEOPLE OF THE STATE OF NEW YORK, BY THE GRACE OF GOD, FREE AND INDEPENDENT.

To all to Whom these Presents Shall Come, Greeting:

Know ye, that, pursuant to a resolution of the Commissioners of our Land Office, dated the day of , 189 , and for the purpose of granting and conveying a destricted beneficial enjoyment in and to the lands under water and between high and low water mark hereinafter described, to the owner of the adjacent uplands, and for no other object or purpose whatsoever, and with the reservations and upon the conditions hereinafter expressed, we have given and granted, and by these presents do give and grant unto heirs and assigns, the land under water and between high and low water mark, described as follows, to wit:

Excepting and reserving to all and every, the said people the full and free right, liberty and privilege of entering upon and using all and every part of the above-described premises in as ample a manner as they might have done had this power and authority not been given, always excepting such parts thereof as are actually occupied and covered by structures, docks or buildings of a permanent character, and such parts of said premises as have been actually filled in and reclaimed from low or marsh land, or have been inclosed by a sea wall.

In testimony whereof, we have caused these our letters to be made patent, and the Great Seal of our said State to be hereunto affixed. Witness, Governor of our said State, at our city of Albany, the day of in the year of our Lord one thousand eight hundred and ninety-

Passed the Secretary's office the day of 189 .

.....

Deputy Secretary of State.

On motion of the TREASURER the above resolution and forms of patents were adopted and the Clerk of this Board was directed to prepare, under direction of the Attorney-General, regulations to conform to the new patents."

THE BUFFALO HISTORY MUSEUM

The Public Lands Law, constituting chapter 11 of the General Laws became chapter 317 of the Laws of 1894. By section 9, the Commissioners of the Land Office were authorized to summarily inquire into the rights of applicants for grants of lands under water. Section 11 confirmed all letters-patent issued prior to July 11, 1881, except lands under water in New York bay or harbor, or adjacent thereto, and sections 70 and 71 authorized the continued grants of lands under water, as follows:

"Section 70. GRANTS OF LAND UNDER WATER.—This section authorizes grants of land under water.

1. Of navigable rivers.

2. Of the Hudson river adjacent to the state of New Jersey.

3. Adjacent to and surrounding Great Barn Island in the city and county of New York, and between high and low-water mark in such island, but not so as to affect the navigation of the waters surrounding such island.

4. Adjacent to and surrounding Staten Island, but not so as to extend more than five hundred feet into the water from low-water mark on said island, except where the legally established pier and bulkhead lines extend more than five hundred feet beyond low-water mark, in which case grants may be made to such lines.

5. Between high and low-water mark, in and adjacent to and surrounding Long Island, and all that part of the former or present county of Westchester lying on the East river or Long Island sound, but not beyond any permanent exterior water line established by law.

6. The commissioners of the land office may grant in perpetuity or otherwise, to the owners of the lands adjacent to the lands under water specified in this section, to promote the commerce of this state or for the purpose of beneficial enjoyment thereof by such owners, so much of said lands under water as they deem necessary for that purpose. No such grant shall be made to any person other than the proprietor of the adjacent lands, and any such grant made to any other person shall be void. No such grant shall be made of any lands belonging to the city of New York, or so as to interfere with the rights of that city or of the Hudson river railroad company, or of its successor the New York Central and Hudson River Railroad Company.

§ 71. NOTICE OF APPLICATION THEREFOR.— Every applicant for a grant of land under water shall, previous to his application, cause notice thereof to be published at least once a week for six weeks, successively, in a newspaper printed in the county in which the land so intended to be applied for is situated; and a copy of such notice to be posted for the same period upon the door of the courthouse of such county, and if there be no courthouse in the county, at such place as the commissioners direct."

Section 70 of the Public Lands Law was amended by chapter 208 of the Laws of 1895 by adding to its first subdivision thereof

THE BUFFALO HISTORY MUSEUM

the words "and lakes" so as to authorize grants of lands under the waters of navigable rivers and lakes. Subdivision 5 was amended by striking out the words at the beginning of the paragraph "between high and low-water mark, in and"; and also by adding after the words "to promote the commerce of this State or for the purpose of beneficial enjoyment thereof for such owners," the words "or for agricultural purposes"; and at the end of subdivision 5 was inserted a new paragraph, reading as follows:

> "In addition to the foregoing, the commissioners of the land office may authorize the use of lands of the State under water, for the purpose of improvement of navigation when the same is carried on by the federal or State government; but private rights or rights of property of individuals, if any, of any nature or description, shall not be taken away nor impaired nor impeded without due process of law."

Chapter 898 of the Laws of 1895, which was "an act to establish the pier and bulkhead lines around Staten Island, as authorized by act of congress of August eleventh, eighteen hundred and eighty-eight," provided as follows:

> "Section 1. The pier and bulkhead lines around the entire shores of Staten Island, as proposed by the board of engineers appointed for the establishment of the harbor lines of New York harbor and its adjacent waters by special order number forty-nine, dated war department, October fifth, eighteen hundred and eighty-eight in accordance with section twelve of act of congress of August eleventh, eighteen hundred and eighty-eight, approved by the secretary of war, June twenty-first, eighteen hundred and eighty-nine, January fourth, eighteen hundred and ninety, March fourth, eighteen hundred and ninety, July twenty-sixth, eighteen hundred and ninety, and August ninth, eighteen hundred and ninety-two, as said pier and bulkhead lines are delineated on the maps filed in the Secretary of State's office in Albany, are hereby established and confirmed.
>
> § 2. It shall be lawful for the owners of piers and bulkheads constructed or hereafter to be constructed, or the owners of land under water granted by the State of New York on the Staten Island side of the harbor of New York, to extend or construct piers not exceeding one hundred and fifty feet in width, with spaces between the same of at least one hundred feet, and bulkheads to the exterior bulkheads and pier lines respectively fixed and established by this act; provided, that grants of any land under water not heretofore granted to the riparian owners which it is necessary to occupy in the construction of said piers and bulkheads, be first obtained from the commissioners of the land office, in accordance with law and upon the payment of such compensation to the State as they may fix and determine; and provided, that no such grant shall be made by the commissioners of the land office except to the owner of the adjacent upland where no previous water grant has been made, and to the owner of the land under water within the water lines established

THE BUFFALO HISTORY MUSEUM

before the passage of this act where such water grant has been made; and provided, that no pier shall be built under the provisions of this act by any water-front owner which encroaches upon land under water not owned by him."

By the charter of the city of New York, chapter 378 of the Laws of 1897, certain lands under water were granted to the city of New York by sections 83 to 86, reading as follows:

"TITLE 2.

Grants of Lands and Franchises to City in Aid of Commerce.

GRANTS OF LAND UNDER WATER.

Section 83. To the end that the city of New York, as herein constituted, may be enabled to make needful provisions for the navigation, intercourse and commerce of the city and adequately to develop and secure the same now and in the future, the said city shall have the control as herein and in this act provided, of the water front of the entire city, subject, however, to the rights of private owners of property, and also power to establish, construct, acquire, own, maintain and enjoy all ferries, public wharves, docks, piers, bulkheads, basins, slips, streets, approaches and spaces, and all other public structures, adjuncts and facilities necessary or proper for the navigation, intercourse and commerce, foreign and domestic, of the city. To these ends, in addition to all other grants, there is hereby granted in fee to the said city of New York, as herein constituted, in all the public streams, rivers, sounds, bays and waters of all descriptions at any and all places within said city or adjoining the limits of said city as herein constituted, all and singular the property, estate, right, title and interest of the people of the state of New York, in, to, of, and concerning such lands and soil covered by water, as are embraced within the projected boundary lines of any street interesting the shore line, and which street is in public use or which may be hereafter opened for public use, extending from high-water out into said streams, rivers, sounds, bays and waters so far (any limits in existing grants to the contrary) as the said city shall now or at any time hereafter in the opinion of its municipal assembly, or department of docks and ferries require the same for ferries, public wharves, docks, piers, bulkheads, basins, slips, or other public structures, adjuncts and facilities for navigation and commerce, including the right for such purposes to reclaim such lands from said waters, and including also all riparian rights, and all rents, issues and profits of the premises herein granted. The commissioners of the land office shall from time to time convey or patent the lands herein granted to the city for said purposes as and whenever required by the board of docks.

PROPERTY AND FRANCHISES INALIENABLE.

§ 84. The property, franchises and rights hereby granted and the works and structures hereby authorized are not the subject of sale but shall be held by the city in perpetuity. But this shall not prevent the city from leasing the same for limited periods of time, in the same manner as it leases other like property.

THE BUFFALO HISTORY MUSEUM

PRIVATE RIGHTS PROTECTED.

§ 85. This grant shall not impair or affect any existing valid private rights, or the existing riparian rights of owners of private property, or the lawful rights of private owners of docks, piers and other structures in the said city or any part thereof.

PATENTING OF LANDS UNDER WATER BY COMMISSIONERS OF THE LAND OFFICE.

§ 86. After the approval of this act no patent of soil or land under water within The City of New York, as herein constituted, shall be made except to The City of New York or to the riparian proprietor. If the board of docks with the approval of the commissioners of the sinking fund, shall project a plan or plans for the construction of docks between street intersections as aforesaid, and desire a grant of land under water for that purpose, they shall make application therefor to the commissioners of the land office, who thereupon shall give notice to the riparian proprietor before taking action in the matter and shall make such grant to the city for the purposes specified in section eighty-three. Such grant, however, shall be subject to all the rights of the riparian proprietor, and before the city shall construct such public wharves or other structures in front of the land of such riparian proprietor, the city shall make just compensation to such proprietor for the value of all the riparian rights. If the commissioners shall make a grant to the riparian proprietor it shall be confined to soil or land under water in front of the land of such riparian proprietor. If application be made to the commissioners of the land office by the riparian proprietor for a grant of soil or land under water within The City of New York, as herein constituted, said commissioners shall give notice thereof to the board of docks of the city, which shall examine into such application and determine whether the granting of the same will conflict with the rights of the city under this act or be otherwise injurious to the public interests of the said city, and shall report their conclusions to said commissioners, who shall insert such terms and conditions in the grant recommended by the board of docks as will protect the public interests of the city in respect to navigation and commerce. The validity of any such grant or patent may be judicially determined in an action brought by and in the name of the city."

By the amendment of the Greater New York charter, chapter 466 of the Laws of 1901, the above sections were slightly amended.

The forms heretofore described were continued in use until December 7, 1899, when the full beneficial enjoyment grant was abolished (see Land Board Minutes 1899, page 187, etc.), upon the report of Secretary of State McDonough, in which he claimed that the Land Board was unauthorized in making such full beneficial enjoyment grants, urging that the lands under water belonging to the State were held by the State in trust for the public and

THE BUFFALO HISTORY MUSEUM

not for any other purposes, and that grants should not be made except for public or quasi-public purposes.

The Land Board at a meeting held March 1, 1900, adopted a resolution and made several grants to contain the following exceptions and reservations:

> "Excepting and reserving to all and every the said people, the full and free right, liberty and privilege of entering upon and using all and every part of the above described premises in as ample a manner as they might have done had this power and authority not been given, until the same shall have been actually appropriated and applied to the purposes of commerce by erecting a dock or docks or other improvements of a substantial character thereon, or for the beneficial enjoyment of the same by the adjacent owner; provided that unless the fulfilment of the purposes set forth in the application and the grant be entered upon in good faith within five years, this grant be null and void."

Another special form for a grant of this kind was made to the Astoria Light, Heat and Power Company in 1899, somewhat similar in form to the last above.

The Land Board on April 5, 1900, adopted a new form of restricted beneficial enjoyment grant, as follows: (See Land Board Minutes, 1900, page 81).

> "On motion of the Speaker the following resolution was adopted:
>
> Resolved, That the form of letters-patent for restricted beneficial enjoyment water grants adopted by the Commissioners of the Land Office June 28, 1894, be and the same is hereby abolished, and that the following form be adopted:
>
> THE PEOPLE OF THE STATE OF NEW YORK, BY THE GRACE OF GOD, FREE AND INDEPENDENT.
>
> *To all to Whom these presents shall Come, Greeting:*
>
> Know Ye, that, pursuant to a resolution of the Commissioners of our Land Office, dated the day of 190 , and for the purpose of granting and conveying a restricted beneficial enjoyment in and to the lands under water and between high and low water mark hereinafter described, to the owner of the adjacent uplands, and for no other object or purpose whatsoever, and with the reservations and upon the conditions hereinafter expressed, we have given and granted, and by these presents do give and grant unto heirs and assigns, the land under water, and between high and low water mark, described as follows, to wit:
>
> These letters patent are issued pursuant to a resolution of the Commissioners of the Land Office for the following purposes, to wit:
>
> Excepting and reserving to all and every the said people, the full and free right, liberty and privilege of entering upon and using all and

THE BUFFALO HISTORY MUSEUM

every part of the above described premises in as ample a manner as they might have done had this power and authority not been given, always excepting such parts thereof as are actually occupied and covered by structures, docks or buildings of a substantial character and such parts of said premises as have been actually filled in and reclaimed from low or marsh land; provided that unless the improvements above named are completed within five years from the date of these presents this grant shall cease and determine and become null and void.

In Witness Whereof, We have caused these our Letters be made Patent, and the Great Seal of our said State to be hereunto affixed. Witness, Governor of our said State, at our City of Albany, the day of in the year of our Lord one thousand nine hundred.

Passed the Secretary's Office the day of 190 .

Deputy Secretary of State."

This form is still in use. The time within which the improvements are required to be made, during the past ten years, has uniformly been five years, except in cases of extensions, where the period of improvement has almost uniformly been three years.

In March, 1902, letters-patent were issued to the New York Dock Company, containing the following clause:

"These letters-patent are issued, however, subject to such right, title, and interest as the city of New York has under the provisions of its charter to lands under water in front of projected streets, if any such there be, and such right, title and interest, if any, are excepted from this grant and reserved to said city."

And since that time all grants of lands under water in the City of New York have contained this clause.

On September 19, 1902, at the request of the Commissioner of Docks and Ferries of the City of New York, the Board decided that thereafter all grants of lands under water in the city of New York should contain the following conditions: (See minutes of Commissioners of Land Office for 1902, pages 152 and 213).

"This grant is made and accepted upon the express covenant, terms and conditions, that The City of New York may at any time hereafter acquire title to the premises herein granted, upon paying to the patentee, his heirs, successors or assigns, the amount paid by such patentee to the State for said premises, together with the value of the improvements thereon, or may acquire title to a part or a portion of said premises, upon paying to the patentee, his heirs, successors or assigns, the proportionate share of the amount paid by such patentee to the State for such part or portion, together with the value of the improvements on the portion thereof required at the time The City of New York shall acquire title to the same, and also all damages, if any there be, to the

THE BUFFALO HISTORY MUSEUM

improvements upon such part of the premises herein granted not acquired by The City of New York, as shall be occasioned by the division of the herein granted premises, and that the patentee, his heirs, executors, administrators, successors or assigns shall not demand, claim or be entitled to receive any further, other or greater compensation for any interest he may have acquired under or by virtue of this patent in or to said premises or in or to the part or parcel thereof so taken by The City of New York."

The only grants that have been made since that time of lands under water in the city of New York not containing the above or similar conditions have been certain renewals of previous grants and certain grants in 1909 and 1910 under the water of Jamaica bay. The form of conditions above mentioned for grants of land under water was changed in the year 1903 to read as follows:

"These letters-patent are issued, however, subject to such right, title and interest as The City of New York has under the provisions of its charter to lands under water in front of projected streets, if any such there be, and such rights, title and interest, if any, are excepted from this grant and reserved to said city.

This grant is made and accepted upon the express covenant, terms and conditions that The City of New York may at any time hereafter acquire the interest in the premises herein described, which the patentee may have acquired under or by virtue of this patent, upon paying to the patentee, his heirs, successors or assigns the amount paid by said patentee to the State for the said interest in said premises, together with the expenses necessarily incurred by the patentee for the acquiring of such patent, which are hereby fixed at the sum of $350, and also the value of the improvements on said premises; or may acquire the interest acquired under this patent to a part or a portion of said premises upon paying to the patentee, his heirs, successors or assigns the proportionate share of the amount paid by such patentee to the State for such interest in part or portion and a proportionate part of the said expenses, together with the value of the improvements on the portion thereof acquired at the time The City of New York shall acquire title to such interest, and also all damages, if any there be, to the improvements upon such part of the premises herein described not acquired by The City of New York as shall be occasioned by the division of the herein described premises. And that the patentee, his heirs, executors, administrators, successors or assigns shall not demand, claim or be entitled to receive any further, other or greater compensation for any interest he may have acquired under or by virtue of this patent in or to said premises or in or to the part or parcel thereof so taken by The City of New York.

And it is further covenanted and agreed in case of a violation or breach of the foregoing covenants, terms and conditions in any manner on the part of the said grantee, his heirs or assigns, then the estate hereby granted shall terminate and these letters-patent shall become null and void, and the people of the State of New York may re-enter into

THE BUFFALO HISTORY MUSEUM

and become possessed of said premises hereby granted and every part and parcel thereof."

(See Land Board Minutes for 1903, pages 48, 80 and 212 to 216; also Land Board Minutes for 1904, pages 99, 110, 120; and Land Board Minutes for 1905, page 177.)

By resolution of the Land Board on June 28, 1906 (See Land Board Minutes for 1906, page 155), it was resolved that all new grants of lands under water outside of the city of New York should contain the following reservation:

"These letters patent are issued, however, subject to such right, title and interest as the town (city or village) of.....has to lands under water in front of projected streets, if any there be, and such right, title and interest, if any, are excepted from this grant and reserved to the town (city or village)."

Since May 9, 1911, the place of residence of grantees is also inserted in every water grant.

Water grants are now made under the provisions of the present Public Lands Law, being chapter 50 of the Laws of 1909. Article VI. of this act, by section 75, authorizes grants of lands under water in the same language as section 70 of chapter 317 of the Laws of 1894 as amended by chapter 208 of the Laws of 1895, and section 76 provides for publication of notice of application in the same words as section 71 of chapter 317 of the Laws of 1894. Section 110 of chapter 50 of the Laws of 1909 provides:

"This chapter shall not limit or modify the provisions of the Railroad Law relating to the grant or acquisition, for railroad purposes, of any land belonging to the People of the State."

Water Grants under Railroad Law.

Grants of lands under water in addition to those directed by the Public Lands Law have been authorized under the Railroad Law to railroad corporations. Section 25 of the Railroad Law of 1850, chapter 140, reads as follows:

"§25. The commissioners of the land office shall have power to grant to any railroad company formed under this act, any land belonging to the people of this state, which may be required for the purpose of their road, on such terms as may be agreed on by them; or such company may acquire title thereto by appraisal, as in the case of lands owned by individuals; and if any land belonging to a county or town is required by any company for the purposes of the road, the county or town officers having the charge of such land may grant such land to such company, for such compensation as may agreed upon."

THE BUFFALO HISTORY MUSEUM

Chapter 148 of the Laws of 1881 provides as follows:

"Section 1. The commissioners of the land office shall have the power to grant to any railroad company formed under the laws of this state any right of way which may be required for the purposes of its road, not exceeding thirty feet in width at grade of road with such additional width as may be required at cuttings or embankments over or across any lands in Richmond county, belonging to the people of the state, including such as are used or occupied by the commissioners of quarantine, the health officer for the port of New York, the trustees of the seamen's fund and retreat in the city of New York, on such terms as may be agreed on by them, or such company may acquire title to such right of way by appraisal, in the same manner as is provided by law for acquiring title for railroad purposes to lands owned by individuals."

The Law of 1850 was amended by chapter 601 of the Laws of 1886 by exempting lands included in the State Reservation at Niagara and the Concourse Lands at Coney Island from the provisions of section 25.

The Railroad Law of 1890, chapter 565, by section 8, provides as follows:

"§ 8. Railroads Through Public Lands — The commissioners of the land office may grant to any domestic railroad corporations any land belonging to the people of the state, except the reservation at Niagara and the Concourse lands on Coney Island, which may be acquired for the purposes of its road on such terms as may be agreed on by them; or such corporation may acquire title thereto by condemnation; and the county or town officers having charge of any land belonging to any county or town, required for such corporation for the purpose of its road, may grant such land to the corporation for such compensation as may be agreed upon."

This was amended by chapter 313 of the Laws of 1904 by providing that in case the land sought to be acquired by the railroad corporation is used for prison purposes, the approval of the Superintendent of State Prisons must also be had; and the present Railroad Law, chapter 481 of the Laws of 1910, by section 18 re-enacts the provisions of chapter 313 of the Laws of 1904.

Chapter 568 of the Laws of 1909 granted certain lands under water at Jamaica Bay in the city of New York. This act provides as follows:

"Section 1. To the end that The City of New York may cooperate with the federal government in the creation of a new harbor in and about Jamaica bay, including the making of channels, basins, slips and other necessary adjuncts, through the excavation of the soil or lands under water, and otherwise intended for the advancement of the com-

THE BUFFALO HISTORY MUSEUM

mercial interests of the city, state and nation, there is hereby granted for the purposes specified in this act, to the city of New York, such right, title and interest as the state of New York may have in and to the land under water in Jamaica bay and Rockaway inlet and the tributaries thereto which lie to the northward of latitude forty degrees thirty-three minutes north, and to the eastward of longitude seventy-three degrees fifty-six minutes west, as now interpreted, excluding, however, all lands under water included within the boundary of Nassau county. This grant shall become operative upon the United States government making its first appropriation for the creation of the new harbor mentioned in this act, or upon the city of New York appropriating and setting aside a sum not less than one million dollars for the same purpose.

§2. The grant shall not affect such land as may hereafter be granted by the commissioners of the land office under any application made prior to May twenty-ninth, nineteen hundred and nine, but if any such application be denied, the land covered thereby shall pass to the city of New York under the conditions of this act."

Railroad Tunnels under East and North Rivers.

The first grants of lands under water around Manhattan Island for the purpose of constructing tunnels appear to have been two made in the year 1891 (see Book 47 Patents, pages 564–565). They were made to the New York and Long Island Railroad Company and the Hudson River Tunnel Company under chapter 140 of the Laws of 1850 and chapter 601 of the Laws of 1886, granting rights of way under the East River between New York City and Hunters Point, and New York City and Jersey City, for the construction of tunnels for railroad purposes.

Section 4 of chapter 4 of the Laws of 1891, creating the Rapid Transit Commissioners in the city of New York, was amended by section 1 of chapter 616 of the Laws of 1900 by providing: "It shall be lawful for said Commissioners to locate the route of any railway or railways, by tunnel under any such public parks, lands, places, *rivers or waters.*" This was amended by section 1 of chapter 564 of the Laws of 1904 to provide that "the said board, from time to time, may locate the route or routes of such railway or railways over, under, upon, through and across any streets, avenues, bridges, viaducts, '*rivers, waters and lands within such city.*'" (See also section 1 of chapter 498, Laws of 1909.)

Section 32 of chapter 4 of the Laws of 1891 was amended by section 3 of chapter 472 of the Laws of 1906 to read as follows:

"§ 32. The said board of rapid transit railroad commissioners may also from time to time, as in this section hereinafter provided, with the ap-

THE BUFFALO HISTORY MUSEUM

proval of the board of estimate and apportionment, or other analogous local authority of such city, grant a right or rights, franchise or franchises or enter into a contract or contracts, upon application to said board of any railroad corporation, now or hereafter incorporated, for the purpose of constructing and operating a tunnel railroad or railroads from an adjoining state under the North or Hudson or Harlem river to a terminus within such city; or under the North or Hudson river and thence transversely across and under the surface of the borough of Manhattan and thence under the East river by the shortest practicable route; such railroad or railroads to be connected with some trunk line steam railroad or railroads whose terminus or termini are in an adjoining state, thereby forming a continuous line for the carriage of passengers and property between a point or points within such adjoining state and a point or points within the said city, provided such purpose is declared in the certificate of incorporation of such corporation. A similar grant may be made, or a similar contract or contracts entered into, upon the application of a railroad corporation, owning or actually operating a trunk line railroad whose terminus or termini are within such city, or of a railroad corporation owning or actually operating or by the certificate of the board of rapid transit railroad commissioners hereinafter in this section mentioned required to own or actually operate a railroad wholly or partly within said city and engaged or intended, and in said certificate so recited and required, to be in interstate commerce in connection with a trunk line railroad and which shall have or be required by such certificate to have a terminus or termini in said city, for the purpose of constructing and operating a railroad or railroads from such terminus or termini by the shortest practicable route to and under or over the East river or the North or Hudson river, or the Harlem river, to any point in an adjoining state, or to connect with any other similar railroad in this state. If and when in the judgment of said board the public interests so demand, the said board may, with like approval, by the concurrent vote of six of its members fix and determine the route or routes by which any such railroad corporation making such application may so establish and construct or so extend its lines into or within said city, and may authorize any such railroad corporation to construct and operate any such railroad or connecting railroad under any lands, streets, avenues, waters, rivers, parkways, highways or public places in the said city, and also in the case of any such railroad or connecting railroad which is, or by the terms of the said certificate of the said board of rapid transit railroad commissioners is required to be, operated or used as a part of an interstate trunk line, to construct and operate the same over and across any such lands, waters, rivers, streets, avenues, parkways, highways or public places in the said city, * * *"

and was again amended by chapter 606 of the Laws of 1906 in minor details, and also by section 6 of chapter 498 of the Laws of 1909 by substituting the "Public Service Commission" for the "Board of Rapid Transit Commissioners," and a few other like changes of phraseology.

THE BUFFALO HISTORY MUSEUM

By chapter 429 of the Laws of 1907, the Public Service Commissioners were created, and by subdivision 6 of section 5, it was provided that the commissioners in the first district shall have and exercise all powers heretofore conferred upon the board of Rapid Transit Commissioners under chapter 4 of the Laws of 1891 and the acts amendatory thereto; and by section 83 it was provided that the Board of Rapid Transit Commissioners shall be abolished and that all the powers and duties of such board conferred and imposed by any statute of this State shall thereupon be exercised and performed by the Public Service Commission of the first district (including the counties of New York, Kings, Queens and Richmond).

By virtue of section 30 of chapter 203 of the Laws of 1878, chapter 566 of the Laws of 1890 and the present Transportation Corporations Law, chapter 218, Laws of 1909, section 48, " the Commissioners of the Land Office shall have power to grant to any pipe line corporation any lands belonging to the people of this state which may be required for the purposes of its incorporation on such terms as may be agreed on by them, or such corporation may acquire title thereto by condemnation, and if any lands owned by any county, city or town be required by such corporation for such purposes, the county, city or town officers having charge of such lands may grant them to such corporation upon such terms and for such compensation as may be agreed upon."

Under an act, chapter 338, Laws of 1892, authorizing the East River Gas Company of Long Island City " to lay, and maintain * * * conductors, mains and pipes under and across the East river and across the intervening land belonging to the City of New York, or to private persons, at such places as it may determine," and also " to acquire by condemnation all such additional property, public or private, or right, interest or easement therein, for the laying and maintaining of its mains, pipes and conductors as may be necessary in the exercise of the powers hereby conferred," the said East River Gas Company acquired by condemnation an easement to construct a tunnel from the foot of One Tundred and Tenth street, Manhattan, to Astoria on Long Island (see 119 App. Div. 350, aff., 190 N. Y. 528).

Renewals of Water Grants.

Under a provision of the Public Lands Law, section 14 of chapter 50 of the Laws of 1909, taken from chapter 313 of the

THE BUFFALO HISTORY MUSEUM

Laws of 1904 and originally revised from R. S. part 1, chapter 9, title 5, sections 58 and 60, which reads as follows:

> "The commissioners of the land office may, unless otherwise provided, fix a reasonable time, not less than one year, for the performance of conditions. A notice of the time so fixed shall be published in the state paper at least once a week for six successive weeks, and a copy of such notice shall be mailed to the persons interested, whose post-office addresses are known. If such conditions are not performed within the time limited by such notice, the persons entitled to any benefit under such grant shall forfeit all right to and title in the premises. When the time within which any condition contained in any grant of land is fixed by the terms of the grant, the commissioners of the land office may, for good cause shown before the expiration of such time, extend the time within which such condition is to be performed, not exceeding three years."

it has been the practice of the Land Board to accept the surrender of former grants and issue new grants usually for a period of three years, in the identical forms under which the original letters patent were issued, and in some instances, just previous to the expiration of the period for which such renewal grants were issued, the Board has granted second extensions. In this connection the opinion of Attorney-General Carmody to the Land Board under date of March 27, 1911, in the Matter of the Application of the New York Dock Company, is pertinent:

> "GENTLEMEN — On April 1st, 1902, grants were made to the New York Dock Company of lands under water adjacent to their uplands lying on the easterly shore of the East River, in the Borough of Brooklyn, extending from Fulton Street to Hamilton Ferry out to the pierhead line of 1900. One of the five grants so made was for seventeen and six hundred fifty-five one-thousandths acres at an appraisal of $42,732 for restricted beneficial enjoyment. (See Land Board Minutes for 1902, pages 63-64.) This grant was made upon the usual conditions and that improvements referred to therein should be made within five years.
>
> On April 25th, 1907, the New York Dock Company having applied for an extension of time within which to comply with the conditions contained in four of the said letters-patent, including the one above particularly described, it was ordered that upon surrender or cancellation of the patents issued to said company April 1st, 1902, above referred to, and upon payment of $50 on account of grant in each case and $5 patent fee for each parcel, that new letters-patent issue to said company in the same form as those surrendered and the time within which to comply with conditions to be limited to three years in each case. Subsequently and at a meeting of the Land Board, held November 14th, 1907, the Commissioner of Docks and Ferries of The City of New York filed with the Commissioners of the Land Office his certificate under Section 86 of the Charter of The City of New York to the effect that the granting of the same would conflict with the

THE BUFFALO HISTORY MUSEUM

rights of The City of New York under the Greater New York Charter, as amended, and be otherwise injurious to the public health of the city unless the following terms and conditions be inserted in said grant:

"The grantee shall in case the grant is made, for the purpose of commerce, furnish access to the dock or docks erected on the lands under water granted, by means of a public highway, and therefore, the Commissioner of Docks of the City of New York respectfully recommends that such terms and conditions, if so recommended, be inserted in said grant."

The Land Board having non-concurred in the recommendation of the Commissioner of Docks and Ferries, and the applicant having surrendered for cancellation his original patents of 1902, and having paid into the treasury of the State, $50 on account of the grant in each case and also $5 patent fee for each parcel, it was thereupon ordered that new letters-patent issue to said company in the same form as those surrendered; the time within which to comply with the conditions to be limited to three years in each case. (See Land Board Minutes for 1907, pages 163 to 166 and 173.) Letters-patent were accordingly issued on November 14th, 1907, providing that unless the improvements specified are completed within three years from the date of these patents, this grant shall cease and determine and become null and void.

On November 14th, 1910, the New York Dock Company filed its application to this Board for a further extension of time to construct the improvements referred to in the original letters-patent, and on March 24th, 1911, the applicant filed an amended application for extension of time to comply with conditions of grant of November 14th, 1907, omitting all reference to the 1902 grant.

By section 75 of the Public Lands Law, the Land Board is authorized to grant lands under water to riparian owners in perpetuity 'or otherwise.' Section 14 of the Public Lands Law, being chapter 46 of the Consolidated Laws, provides that the Commissioners of the Land Office may, unless otherwise provided, fix a reasonable time, not less than one year, for the performance of the conditions and further provides 'when the time within which any condition contained in any grant of land is fixed by the terms of the grant, the Commissioners of the Land Office may, for good cause shown before the expiration of such time, extend the time within which such condition is to be performed, but not exceeding three years.'

Section 76 of the Public Lands Law provides that 'every applicant for a grant of land under water shall previous to his application cause notice thereof to be published at least once a week for six weeks successively, in a newspaper printed in the county in which the land so intended to be applied for is situated, and a copy of such notice to be posted for the same period upon the door of the court house of such county, and if there be no court house in such county, at such place as the commissioners direct.'

Section 14 above referred to (except that portion quoted) was taken from first revised statutes, sections 58, 59 and 60, title 5, chapter 9, part 1, having reference only to unappropriated State lands and not at all to lands under water.

THE BUFFALO HISTORY MUSEUM

The sentence quoted, authorizing extensions of time within which to comply with conditions, was new matter first inserted in the revision of the law by chapter 317, Laws of 1894, the Public Lands Law. For many years past and as early as 1885, resolutions were passed by the Land Board, without express legislative authority, extending the time of patentees of water grants to comply with conditions, but apparently it was not until after the Act of 1894 that new letters-patent therefor were actually issued, the older method being to furnish the patentee merely with a certified copy of the resolution of extension. It is very doubtful whether section 14 or any part of the section was intended to have any application whatever to *lands under water* and even if it was so intended, it is questionable whether letters-patent for an extended period, can lawfully be granted without publication and posting of the statutory notice required by section 76.

Assuming, however, that the Land Board has the power under section 14 to extend the time to comply with conditions in water grants, only one such extension for period not exceeding three years is contemplated by the statute. The patent of 1907 to the New York Dock Company was made without advertisement of notice under section 76 and, therefore, must be construed to be merely an extension and not an original grant.

I am, therefore, of the opinion that your Honorable Board has no power to grant the second extension now asked for, except after a new application, as provided by sections 75 and 76 of the Public Lands Law. Should such new application be made, I am further of the opinion that the Land Board may properly waive its customary rules, except those in relation to publication and posting of the statutory notice of the application required by section 76, and also of proof of service of a copy of such notice upon the local authorities, referring to the original application papers for other facts. Your Honorable Board may take into consideration, in fixing the price to be paid by the applicant for a new grant, the amount of money he has already paid for patents of said premises.

Respectfully submitted,
THOMAS CARMODY,
Attorney-General."

At a meeting of the Land Board held April 27, 1911, the Attorney-General presented the following rules and regulations governing applications for extensions of time within which, to comply with conditions contained in letters-patent, which, on motion, were adopted:

"COMMISSIONERS OF THE LAND OFFICE, ALBANY, N. Y.:

Resolutions governing extensions of time within which to comply which the conditions *contained in Letters-Patent.*

Resolved, That every applicant for an extension of a grant of land under water shall comply with the following regulations:

1. Every such applicant, previous to the filing of his application, shall, unless otherwise ordered by the Commissioners of the Land Office, give notice thereof, by advertisement, to be published at least once each week

THE BUFFALO HISTORY MUSEUM

for six consecutive weeks in a newspaper printed in the county in which the land so intended to be applied for is situated and by causing a copy of such notice to be posted for the same period upon the door of the court house of such county, and if there be no court house in the county, at some prominent place which may be designated by the board of supervisors of said county, for posting legal notices in accordance with the provisions of section 76 of the Public Lands Law.

2. Such notice shall state that any person deeming himself liable to injury by reason of such grant may file with the Commissioners of the Land Office a remonstrance, stating why said grant will be an injury to him or his property, and that said remonstrance should be filed on or before the date of filing of the said application and said notice shall be substantially in the following form:

FORM OF NOTICE FOR PUBLICATION.

* * * * * * * * * * *

3. Affidavits of the due publication and posting of said notice shall be filed with said Commissioners.

4. In all cases where the lands under water applied for are situated in the city of New York, a copy of such notice shall be served, at least thirty days before filing said application upon the corporation counsel and the commissioner of docks of said city, and in all other cases, if in a city, on the mayor thereof, if in an incorporated village on the president thereof, or if in neither a city or incorporated village, then, on the supervisor or town clerk of the town, and affidavits of such service shall also be filed with said Commissioners.

5. The applicant shall also present a verified petition, stating:

a. The date of the original water grant and name of grantee.

b. The work actually done as contemplated in the grant, and reasons why the work has not been done or completed.

c. That the applicant is still the owner of all of the uplands described in the original application, or if he has disposed of any of said uplands, full particulars of such sale and a full description of his present uplands and lands under water adjoining the same by metes and bounds, and a map showing the uplands owned by him, together with the adjoining lands under water, and also showing the character of improvements made under the grant, if any have been made.

d. That the petitioner intends in good faith to appropriate the lands for the purposes set forth in the original grant, and the character of improvements he intends to make and within what time he intends to make the same.

The said petition being approved by the Attorney-General and the State Engineer, and being granted by the Board, letters-patent shall issue to the petitioner in the same manner as in original applications (except that the time within which to comply with the conditions therein contained shall be limited to three years), upon payment of a sum to be determined in each instance by the Board, together with the usual patent fee of $5 for *each parcel*.

The above provisions shall apply to the original grantee, his heirs, executors, administrators or assigns, but satisfactory proof of the interest of the latter must be submitted.

THE BUFFALO HISTORY MUSEUM

If application is made for an extension of time covering the same lands as the original patent, said patent must be attached to the petition.

6. If the petitioner is not the original grantee he must prove title to the satisfaction of the Board and proof of title must be attached to and made part of the petition."

Lease for Shell Fish Cultivation.

Chapter 385 of the Laws of 1884 ceded lands under water of Gardiner's and Peconic bays to Suffolk county, for the cultivation of shell fish.

Chapter 584 of the Laws of 1887 provided for the granting of perpetual franchises by the Commissioners of Fisheries for the purpose of shell fish cultivation on the lands under the waters of this State, mentioned in section 1 of this act, suitable for planting and cultivation of shell fish, but the provisions of this act are declared not to be deemed to limit or interfere with the powers of the Commissioners of the Land Office to grant to owners of uplands adjacent to such fisheries any of the lands under the waters of this State, as is now provided by law, but any grant by the land board of lands used for shell fish cultivation shall be subject to the right of the occupant to use said lands for such cultivation and removal of shell fish within two years thereafter.

See also section 6 of the Game Law, chapter 488, Laws of 1892 and amendment by section 2, Chapter 573, Laws of 1893.

See also Fisheries, Game and Forest Law, chapter 395, Laws of 1895, sections 7, 197 and 198, and amendments by chapter 653, Laws of 1896, and chapter 657, Laws of 1896.

See also Forest, Fish and Game Law, chapter 20, Laws of 1900, sections 158, 159 and 160, and amendment by chapter 100, Laws of 1901, and Forest, Fish and Game Law, chapter 24, Laws of 1909, sections 195, 196, 197 and 198, authorizing the Superintendent of Marine Fisheries, under the direction of the Forest, Fish and Game Commission to lease lands under water for such shell fish cultivation, subject, however, as before to the power of the Commissioners of the Land Office to grant such lands.

See also Conservation Law, chapter 647, Laws of 1911, sections 150, 151, 154, 155 and 156.

Many special laws have been passed, too numerous to mention in this schedule, empowering the Land Board to make grants of lands under water.

(Compiled by E. H. Leggett.)

THE BUFFALO HISTORY MUSEUM

STATE OF NEW YORK

OFFICE OF THE ATTORNEY-GENERAL

OPINION

Rendered to the Senate of the State of New York Relative to the

Constitutionality of the Charter of the Long Sault Development Co.

THE BUFFALO HISTORY MUSEUM

THE
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HISTORY
MUSEUM

OPINION RENDERED TO THE SENATE OF THE STATE OF NEW YORK RELATIVE TO THE CONSTITUTIONALITY OF THE CHARTER OF THE LONG SAULT DEVELOPMENT CO.

LONG SAULT DEVELOPMENT COMPANY — CHARTER — CONSTITUTIONALITY.

Chapter 355 of the Laws of 1907 granting certain powers and privileges to the Long Sault Development Company is unconstitutional in that:

First. It contravenes section 18 of article III of the State Constitution, which provides that the Legislature shall not pass a private or local bill granting to any private corporation, association or individual any exclusive privilege, as contemplated by section 18 of article III of the Constitution.

Second. It violates section 7 of article VII of the State Constitution, which provides that the lands of the State now owned or hereafter acquired, constituting the Forest Preserve, as now fixed by law, shall be forever kept as wild forest lands, and shall not be leased, sold or exchanged, or taken by any corporation, public or private. The bed of the St. Lawrence river, which, by the act in question, is directed to be conveyed to the Long Sault Development Company, is owned by the State and was so owned at the time the provision of the Constitution was adopted, and was included within the Forest Preserve, as defined by section 100 of chapter 332 of the Laws of 1893, describing the lands included within the State Forest Preserve.

Third. The act in question is a private bill and embraces more than one subject, and is, therefore, in violation of article III, section 16 of the State Constitution, which provides that no private or local bill which may be passed by the Legislature shall embrace more than one subject, and that shall be expressed in its title.

Fourth. The act is invalid as being in excess of the powers of the Legislature, in that it provides for the alienation by the State to the Long Sault Development Company of title to the lands in the bed of the St. Lawrence river. The title of the State in these lands is a sovereign right, rather than a proprietary title. It is inconsistent with that right, which must be exercised for the benefit of the whole people, that the title to the bed of a navigable stream should be granted in fee to a private corporation.

OPINION.

I herewith submit my opinion to your honorable body, pursuant to your resolution of March 29, 1912, which is as follows:

> "WHEREAS, An act constituting chapter 355 of the Laws of 1907, provides among other things that certain persons therein named shall be a corporation to be designated as the 'Long Sault Development Company'; and
>
> "WHEREAS, Such act further purports to convey to said corporation valuable and exclusive privileges and rights, and

THE BUFFALO HISTORY MUSEUM

directs the conveyances to said corporation of certain lands belonging to the State under the waters of the St. Lawrence river and referred to in said act; and

"WHEREAS, It is claimed that said corporation is proceeding under such act to acquire private lands, and to secure the consent of the governments of the United States, and of the Dominion of Canada, confirming said act and the privileges assumed to be granted thereby; and

"WHEREAS, It is further claimed that such act is unconstitutional in that it assumes to convey exclusive rights and privileges by special enactment, and further assumes to convey a portion of the forest preserve of the State which by the constitution is made inalienable on the part of the State; be it therefore

Resolved, That the Attorney-General of the State is hereby requested to transmit to the Senate for its further consideration his written opinion as to whether such act as aforesaid contravenes the constitution of the State in any of the matters herein referred to, or in any other particulars; and if in his judgment it does, what if any present action or proceedings may be brought by the State to ascertain judicially such fact; and that such written opinion be ready for submission on the reconvening of the Senate in the year 1913, or at any time prior thereto if the same shall be convened in extraordinary session and prepared to receive the same.

SUBSTANTIAL PROVISION OF THE ACT.

Chapter 355 of the Laws of 1907 became a law on May 23, 1907, by the approval of the Governor. The act is entitled:

"AN ACT to incorporate the Long Sault Development Company, and to authorize said company to construct and maintain dams, canals, power-houses and locks at or near Long Sault Island, for the purpose of improving the navigation of the St. Lawrence river and developing power from the waters thereof, and to construct and maintain a bridge, and carry on the manufacture of commodities."

Section 1 constitutes the Long Sault Development Company a body corporate, for the purposes of

THE BUFFALO HISTORY MUSEUM

"erecting, constructing, maintaining, operating and using in connection with the Saint Lawrence river, a dam or dams, a canal or canals, a reservoir or reservoirs and a power house or power houses, and works appertaining thereto, at or near Long Sault Island in the County of Saint Lawrence, and of erecting and constructing a lock or locks, and works appertaining thereto, at or near the same place, all for the development of electrical power and energy and the permanent improvement of navigation on the Saint Lawrence river at and above and below said place; and also of constructing and maintaining a bridge upon or in connection with said works and of carrying on the manufacture of commodities with the said power."

Section 2 of the act confers upon the company, corporate powers usually possessed by corporations organized under general laws and particularly authorizes it to

"(3) To acquire, by grant, gift, purchase, devise, bequest or other lawful means, and to hold and dispose of such property as its purpose shall require, subject to such limitations as may be prescribed by law;"

Section 3 of the act provides:

"Said corporation shall have the right to erect, construct, maintain, operate and use all such dam or dams, canal or canals, reservoir or reservoirs, gates, sluices, trunks, pipes, bulkheads, piers, flumes, abutments, and other works appurtenant thereto, as may be proper or useful for the purpose of the development of water power, and of electrical power and energy therefrom, at such point or points upon or adjacent to the south shore of the Saint Lawrence river, near Long Sault island or Barnhart's island, and upon the said islands, or either of them, and between said islands, and between said islands or either of them and the shores of the said river and Sheik's island (but not across the international boundary line unless consented to by the Dominion of Canada), as may be selected by said corporation, and also in and upon so much of the said river and the bed thereof

THE BUFFALO HISTORY MUSEUM

as lies to the south of the international boundary line, at or near Long Sault island or Barnhart's island, either independently or in connection with like works now erected, or to be erected, in so much of said river and the bed thereof as lies to the north or Canadian side of said international boundary line, and upon and adjacent to the northerly shore of said river; and to erect, construct, maintain, operate and use a power-house or power-houses, and conductors, cables, wires, insulators and other appliances in connection with the said works for the development of electrical power and energy; and also to take and use the waters of said river at and above the points of location of said works heretofore authorized, and to construct and maintain upon, over and in connection with said dam or dams and other works, a bridge or bridges across or partly across the Saint Lawrence river, with the approaches thereto, for the use of foot passengers, animals and vehicles, and to charge reasonable rates of toll for passage thereon; the said rights being granted upon the express condition that said corporation shall make just compensation to all persons injured by the exercise of the rights and privileges heretofore granted, and that said corporation shall also erect and construct a lock or locks as may be required by the United States of America, and shall provide electrical power or energy for the maintenance, operation and use of said lock or locks, free of charge, and shall in all other respects perform, fulfill and abide by all and singular the conditions and provisions of this act, and also of any act of congress of the United States relating thereto, and also upon condition that the rights hereby granted shall never be so used as to impair or obstruct the navigation of the Saint Lawrence river, but on the contrary, that such navigation shall be preserved in as good condition as, if not better than, the same is at present, regard being always had to the amount of the natural flow of water in said river as affecting its navigability from time to time."

Section 4 of the act provides that after the United States shall have authorized the construction of dams, locks and canals au-

THE BUFFALO HISTORY MUSEUM

thorized by section 3, and after the payment by said corporation into the treasury of the State of the fixed sum of $10,000, then "the Commissioners of the Land Office shall upon application of said corporation grant unto it the title and interest of the people of the State in and to lands under the waters of the Saint Lawrence river." These lands "to be covered or occupied by said works and locks and power-houses."

The section then contains the proviso:

> "That any of the lands of the state which may be so conveyed to said corporation shall be forfeited and title thereto shall revert to the state unless the same are actually used by said corporation and covered by its dams, canals, reservoirs, gates, sluices, trunks, pipes, bulkheads, piers, flumes, abutments or other works appertaining thereto, or are necessary to the enjoyment for said purposes of any lands so used or covered, within fifteen years from the conveyance thereof by the commissioners of the land office to said corporation under authority of this act."

Section 4 continues:

> "And in consideration of the conveyance so made under the authority of this act, as well as for the rights and privileges hereby granted the said corporation in addition to the payment aforesaid shall pay into the treasury of the state for the year nineteen hundred and ten the fixed sum of fifteen thousand dollars, and for the year nineteen hundred and eleven the fixed sum of twenty thousand dollars. For each year after nineteen hundred and eleven the said corporation shall pay at the following rates upon the average amount of electrical horse power generated during such year under the authority of this act, that is to say: Upon all amounts up to twenty-five thousand electrical horse power, at the rate of seventy-five cents per horse power;
>
> "Upon all amounts in excess of twenty-five thousand electrical horse power and up to one hundred thousand electrical horse power, at the rate of fifty cents per horse power; upon all amounts in excess of one hundred thousand electrical

THE BUFFALO HISTORY MUSEUM

horse power, at the rate of twenty-five cents per horse power. In case said corporation shall generate or develop water power as mechanical power, without transmitting the same into electrical power, then for so much of said water power as shall be so generated or developed, payment shall be made at the above mentioned rates per mechanical horse power."

In the ascertainment of the average electrical horse power generated, section 4 prescribes the following rule:

"In determining the average amount of electrical horse power generated and the average amount of mechanical horse power generated or developed in any year, for the purpose of determining the amount to be paid to the state, no day nor hour during which the works of said company are not in substantial operation shall be included in the total time for which such average is to be determined as the average for the year."

Provision is then made for such payments on or before February 1st of each year and that the records and books of the said corporation shall be open to inspection by the State authorities, who shall also have power to prescribe the standard and character of the measuring instruments and devices and test the same.

Disputes in regard to the amount payable are referred for settlement to the Court of Claims.

Section 4 then provides:

"In case the said corporation shall fail to pay any amount due hereunder, within sixty days after the same is payable as herein provided, in addition to any other remedies which may exist by law, the rights and privileges hereby granted may be forfeited."

It is further provided:

"The payments above specified are based upon the assumption that the said corporation under the authority of this act, subject only to the lawful control of the United States government, may use for the purposes herein speci-

THE BUFFALO HISTORY MUSEUM

fied, at the places herein mentioned, *all* of the waters of the Saint Lawrence river south of the international boundary line, but in case said corporation shall at any time be compelled to make any payment to the Dominion of Canada or the Province of Ontario for the use by said corporation of any portion of said water to generate power as authorized by this act, said corporation shall be entitled to an equitable readjustment of the rate of compensation to be paid to the state for that portion of the said water for the use of which said corporation shall be compelled to make payment to said dominion or province."

Provision is made that such readjustment shall be made by arbitrators and for their appointment, and that the decision of such arbitrators shall be final and binding upon the parties.

Section 5 of the act gives the company the power to

> "Sell or convey all or any portion of its property and assets, and the franchises and rights appurtenant thereto, upon such terms as may be consented to as aforesaid, but subject always to all the conditions and provisions of this act."

Section 6 makes the existence of the corporation perpetual.

Section 7 fixes the capital at $1,000,000, with shares of a par value of $100 each. It requires the corporation before commencing business to have $250,000 of the par value of the capital stock subscribed and paid for in cash, and requires that the organization tax provided by the General Laws of the State of New York be first paid to the State Treasurer.

Section 8 fixes the number of directors of said corporation at five.

Section 9 provides:

> "The said corporation shall begin the work of constructing its dam pursuant thereto within one year after the congress of United States shall authorize the construction of dams, locks and canals hereby authorized, and in case such construction shall not be so begun the grants, rights and privileges hereby granted may be forfeited."

THE BUFFALO HISTORY MUSEUM

OPINION.

The act in question, chapter 355 of the Laws of 1907, contravenes section 18 of article III of the State Constitution.

Section 18 of article III of the State Constitution is as follows:

> "The Legislature shall not pass a private or local bill in any of the following cases: * * * granting to any private corporation, association or individual any exclusive privilege, immunity or franchise whatever."

This provision of the State Constitution was not inserted until 1874 and took effect January 1, 1875. I have been unable to find any decision of our courts since that time directly involving the question here presented, namely: does a grant by the Legislature to a private corporation of a right or privilege to dam a navigable stream and appropriate and utilize the whole power therefrom contravene the above provision.

The Act of 1907 is plainly a private and a local bill.

It is a private bill in that it relates only to a particular corporation, organized for private gain, to be controlled by private stockholders.

The Court of Appeals, in Economic Power & Construction Company v. The City of Buffalo, 195 N. Y. 286, held that every act incorporating a company for private gain and generally all acts relating to a single corporation are private acts. This act comes under the above definition and is, therefore, a private act.

The courts define a local act as one which in its subject relates to but a portion of the people of the State or to their property, and may not, either in its subject, operation or immediate and necessary results, affect the people of the State or their property in general. People v. Supervisors of Chautauqua, 43 N. Y. 10; Johnston v. Spicer, 107 N. Y. 201; Astor v. Arcade Railroad Co., 113 N. Y. 93.

This act comes clearly within the above definition and is, therefore, a local act, within the meaning of section 18, article III of the Constitution.

It remains to be determined whether the rights and privileges granted are exclusive, within the meaning of the Constitution.

By section 3 of the act in question, the Long Sault Develop-

THE BUFFALO HISTORY MUSEUM

ment Company is given the right " to erect, construct, maintain, operate and use such dam or dams, canal or canals, reservoir or reservoirs, gates, sluices, trunks, pipes, bulkheads, piers, flumes, abutments and other works appurtenant thereto, as may be proper or useful for the purpose of the development of water power and of electrical power and energy therefrom, at such point or points upon or adjacent to the south shore of the St. Lawrence river, near Long Sault island or Barnhart's island, and upon the said island, or either of them, and between said islands, and between said islands or either of them and the shores of the said river and Sheik's island (but not across the international boundary line unless consented to by the Dominion of Canada), as may be selected by said corporation, and also in and upon so much of the said river and the bed thereof as lies to the south of the international boundary line, at or near Long Sault island or Barnhart's island, either independently or in connection with like works now erected, or to be erected, in so much of said river and the bed thereof as lies to the north or Canadian side of said international boundary line, and upon and adjacent to the northerly shore of said river; and to erect, construct, maintain, operate and use a power-house or power-houses, and conductors, cables, wires, insulators and other appliances in connection with the said works for the development of electrical power and energy; and also to take and use the waters of said river at and above the points of location of said works heretofore authorized.

Stronger or more comprehensive or more definite language could not be used by the Legislature in conferring upon the company the right, power and privilege of controlling, for the purpose of electrical power and energy, the waters of the St. Lawrence river at this point.

It might be argued, were the company limited to the use and development of the water-power in and about Long Sault island, that the privilege granted is not exclusive, but when it is considered that the company is given the right to develop water-power, at and above said place, the conclusion is inevitable that an exclusive privilege is granted, the limitations of which, in respect to location, are not defined, and may be asserted by the company to prevent all others from enjoying a similar privilege, not only at, but above Long Sault island. How far above is not provided.

THE BUFFALO HISTORY MUSEUM

Authority is likewise conferred upon the corporation to erect all structures that it may deem proper or useful for any of the purposes described, at any points on the south shore or the north shore of the St. Lawrence river, upon any of the three islands named, or between the islands or in the bed of the river, either independently or in connection with like works now erected, or to be erected, in so much of said river and the bed thereof as lies to the north or Canadian side of said international boundary line, and upon and adjacent to the northerly shore of said river.

The act, therefore, not only grants to the corporation the exclusive right to develop and utilize all the water-power in and around Long Sault island, but also contemplates a more comprehensive, general and exclusive control of the waters of the St. Lawrence river at and near that vicinity, by constructing, independently or in connection with works at present existing or to be hereafter constructed on the Canadian side of the river. If the Long Sault Development Company is able, either through connections with a company or companies on the Canadian side, or by independent action, to obtain a similar grant of power on the Canadian side, there can be little question about the exclusive nature of the privileges and power it would thereby be permitted to exercise.

In addition to all this, it is important to note that the power granted is perpetual.

In view of the language above quoted and in the light of all of the facts at hand, the conclusion seems irresistible that the Legislature of 1907 intended and endeavored to grant to the Long Sault Development Company the exclusive right, either independently or in connection with other corporation or corporations, to control all of the water-power that could be generated at that place in the St. Lawrence river and within a vague and undefined area "above that point," not only for the present generation, but in perpetuity.

Under this grant, if valid, succeeding Legislatures are prevented from granting privileges to any individual or corporation to utilize any of the water-power at the Long Sault rapids. It may also be claimed by the Long Sault Development Company that, because of its right to utilize the water above Long Sault island, no grant can be made by the Legislature, at least within a reason-

THE BUFFALO HISTORY MUSEUM

able distance above the point in question, without impairing the charter of the Long Sault Development Company.

The company might also maintain that any structure hereafter authorized, above or below the location in question, which would in any wise effect the hydraulic head or lessen in any degree the efficiency of any of the structures of the Long Sault Development Company, would financially damage, and thereby impair, the exclusive rights, powers and privileges which the Long Sault Development Company received from the Legislature.

I believe that section 18 of article III of the Constitution was adopted for the very purpose of preventing such grants as this. At the time when this amendment was adopted, in 1874, nearly all of the available power sites within the State had been granted by the Legislature by special acts, with scarcely any revenue to the State.

The preservation to future generations of the water-power not theretofore granted, and which was practically located in the two border streams, the Niagara and the St. Lawrence, was a vital, essential and important duty. By section 18 of article III the people undertook to put an end to the granting of these exclusive privileges, and it is not unreasonable that they had in mind the undeveloped water-power of these two great streams. In any event, it was plainly declared in that provision that no exclusive privilege, immunity or franchise should be thereafter granted by the Legislature.

The charter in question plainly violates this provision, when we consider the causes that led to the adoption of, and the purpose sought to be obtained by this amendment.

There are many decisions of the courts interpreting this language of the Constitution, but none that I have been able to find which determine the question contrary to the conclusion which I have reached.

The terms of the Constitution are so plain, simple and comprehensive as to leave little room for construction. Nothing can be added to or taken from the language employed to make more plain the object aimed at. That object, as provided by the language of the provision, and as uniformly interpreted by the courts, is twofold: 1. To prevent monopoly; 2. To leave open competition.

THE BUFFALO HISTORY MUSEUM

Keeping these objects in view, there is to my mind little difficulty in applying the constitutional mandate to any given state of facts.

It is urged, upon the authority of Matter of Application of Union Ferry Company, 98 N. Y. 139, that a privilege, immunity or franchise is not exclusive within this provision of the Constitution, which does not, by its terms, prohibit the enjoyment of a similar privilege, immunity or franchise by someone other than the grantee. This is founded upon the language of the court in that case, to be found at page 153, which is as follows:

> "The exclusiveness prohibited is one which is created by terms of the grant, not that which results from the nature of the property or right granted."

In that case the court was considering an act of the Legislature passed in 1882, entitled "An act to provide additional ferry slips and facilities in New York city for the ferries running between Whitehall street in the city of New York and Brooklyn." At page 148 the court said:

> "The whole frame and context of the act are consistent with the view that its object was not to grant any privilege or franchise to the Union Ferry Company as a corporation, but as stated in the title of the act, to add to the ferry slips and facilities of the particular ferry which the company named was, at the time, operating."

The court further held, in sustaining the constitutionality of that act, that the additional facilities granted by the act would increase the capacity, not only of the grantee, but of all future lessees of the ferry, to meet the wants of the public, and that those increased facilities would be enjoyed by the grantee only under its lease from the city, and would terminate with the lease and pass to succeeding lessees, and that the property could not be used for any purpose except the exercise of the ferry franchise granted by the city, and in whose hands that franchise might be from time to time.

The court placed particular emphasis upon the fact that the privilege was not exclusive in respect to the character of the

THE BUFFALO HISTORY MUSEUM

rights granted, nor indefinite in respect to the time of its enjoyment, and pointed out as exempting the statute from the constitutional inhibition, that the right granted, even while enjoyed by the Union Ferry Company, could also be enjoyed by other companies and at the termination of the lease of the Union Ferry Company, the particular right granted to that company would pass to its lessee.

The facts of this case, it will be seen, immediately take it outside of the facts in the Long Sault case. The reasoning of the court in the Union Ferry Company case is not antagonistic to the contention that an exclusive privilege was granted to the Long Sault Development Company.

At page 151 the court cites cases of exclusive privileges condemned by this provision of the Constitution, among them the Cayuga Bridge Company v. Magee, 2 Paige 116, in which case the charter of the Cayuga Bridge Company provided that it should not be lawful to erect any bridge or establish any ferry within three miles of the place where the bridge of the company should be erected, or to cross the river within three miles of the bridge without paying toll.

If we apply that doctrine to this case it condemns the charter. While the act does not expressly provide that no other company shall enjoy the privilege of the Long Sault Development Company within the area covered by the grant, yet the terms of the grant itself make it impossible that any other grant could be made by the State, or that any other company or any other individual, even the present riparian owners, could utilize the water for power purposes in that portion of the river.

I can see no distinction in principle between the provisions of an act of the Legislature which expressly provide that there shall be no competition within a given area, and the provisions of an act which make it impossible that there should be. To hold that a different principle applies is to give an absurd construction to this most vital constitutional principle. Certain it is that the Union Ferry Company case is not authority for any such contention.

That case further cites, as an instance of an exclusive privilege, the decision of the Court in Mohawk Bridge Company v. U. &

THE BUFFALO HISTORY MUSEUM

S. R. R. Co., 6 Paige 554. In that case the Mohawk Bridge Company received a charter to cross the Mohawk. The charter prohibited ferries crossing the river one mile above and one mile below.

Suppose in that case the Legislature, instead of providing that no other ferries should cross one mile above or one mile below, had made a grant to the Mohawk Bridge Company of the waters of the Mohawk and the bed of the stream, one mile above and one mile below. It is plain that such a grant would as effectively prevent other ferries from crossing within that area as if the statute expressly so provided.

I am well aware that, in the Union Ferry Company case, the Court of Appeals announced the principle that the right granted is not exclusive simply because it is impossible that any other person or corporation should enjoy that right, holding that, where it is important to the public interest that a privilege should be exercised by someone, the State must necessarily have authority to select the grantees, and that in such a case the exclusiveness is not produced by the grant, but results from the nature of the thing granted.

That doctrine cannot be so extended as to protect a grant which, although in terms is not exclusive, yet in addition to the privilege granted, grants other rights and privileges and properties which, upon the face of the act itself, make the privilege exclusive.

The court instances, as supporting this construction, grants of charters to toll bridge companies, grants of land to railroad companies for depots, car-yards, etc. These rights, of course, are to a certain extent exclusive, but the grant of a right to build a toll bridge is based upon an obligation on the part of the company to serve the public by improving the highway over which toll is taken. The right granted is in return for a public service rendered, while the rights granted to railroad companies to acquire depots, car-yards, etc., are necessary for the enjoyment of the franchise given to the companies, and that brings the case within an entirely different principle. In both these cases the use is a public one, and essential for the purpose of enjoying the charter granted by the State, and it is within the power of the Legislature to determine the necessity of the grant, and when it so determines,

THE BUFFALO HISTORY MUSEUM

keeping within the line so clearly marked out by the court in the Union Ferry Company case, the grant is not violative of the Constitution.

The grant made to the Long Sault Development Company is not within the protection of these principles. It is exclusive within a certain undefined area. The powers granted are not in the interest of the public, and the important ones, such as the grant of the title to the bed of the river, are not essential to the enjoyment of the privilege of developing a water-power and electrical energy. It prevents competition; it creates a monopoly in as clear and emphatic terms as could possibly be used by the Legislature.

I think it is clear, therefore, that it violates section 18 of article III of the Constitution of the State of New York.

THE ACT IN QUESTION VIOLATES SECTION 7 OF ARTICLE VII OF THE STATE CONSTITUTION, WHICH PROVIDES THAT THE LANDS OF THE STATE NOW OWNED OR HEREAFTER ACQUIRED, CONSTITUTING THE FOREST PRESERVE, AS NOW FIXED BY LAW, SHALL BE FOREVER KEPT AS WILD FOREST LANDS AND SHALL NOT BE LEASED, SOLD OR EXCHANGED OR TAKEN BY ANY CORPORATION, PUBLIC OR PRIVATE.

The bed of the St. Lawrence river is within the boundaries of the county of St. Lawrence. Chapter 332 of the Laws of 1893 (article VI, chapter 43, of the General Laws) provides:

> " Section 100. Forest Preserve. The forest preserve shall include the lands now owned or hereafter acquired by the state within the counties of * * * St. Lawrence, * * * except
>
> " 1. Lands within the limits of any village or city and
>
> " 2. Lands, not wild lands, acquired by the state on foreclosure of mortgages made to the commissioners for loaning certain moneys of the United States usually called the United States deposit fund."

This statute was in force when the present constitution was adopted, which went into effect January 1, 1895, and contained the following clause:

THE BUFFALO HISTORY MUSEUM

> "Article VII, Section 7. The lands of the State, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed."

This provision of the Constitution read in connection with the provisions of the statute then in force leads inevitably to the conclusion that the lands in question are within the forest preserve and may not be alienated. The Court of Appeals in People v. Fisher, 190 N. Y. 480, in considering what are forest preserve lands uses the following language:

> "The language of the statute thus specifying the lands which are included within the forest preserve is clear and definite and does not in itself require construction. Its plain and positive language is made even more certain by the fact that some exceptions are stated therein."

The bed of the St. Lawrence river covered by the grant in question, being within the county of St. Lawrence and the State of New York is land owned by the State, constituting the Forest Preserve as defined by chapter 332 of the Laws of 1893.

There is no dispute that the land in question is so located, otherwise the Legislature of the State of New York could not grant title to these lands, as it undertook to do in the grant to the Long Sault Development Company.

My attention has been called to the very able brief of Henry W. Taft, Esq., in respect to the constitutionality of the charter of the Long Sault Development Company in which he argues at length, and with much force, that the lands in question were not intended to be included within the definition of the Forest Preserve, and therefore, are not within the inhibition of article VII of section 7 of the Constitution.

I am unable to follow his reasoning and to give the language of the statute and the language of the Constitution any other than its plain and natural meaning. Nothing is left open for construction. I do not see how the statute defining the Forest Preserve could use more apt language in including the waters

THE BUFFALO HISTORY MUSEUM

under the St. Lawrence river than it has used; nor how the constitutional convention could have more clearly expressed the policy of the State against alienating these lands.

THE ACT OF 1907 IS A PRIVATE BILL WHICH EMBRACES MORE THAN ONE SUBJECT AND IS DEFECTIVE AND ERRONEOUS IN ITS TITLE.

Article III, section 16, of the State Constitution provides that:

> "No private or local bill, which may be passed by the Legislature, shall embrace more than one subject, and that shall be expressed in the title."

The subjects embraced in the bill in question are as follows:

1. The creation of the corporation.
2. The construction, maintenance and operation of construction at or near Long Sault island.
3. The development of power from the waters of the St. Lawrence.
4. Constructing and maintaining a bridge.
5. The manufacturing of commodities.
6. The levying and taking of tolls.
7. The erection of transmission appliances.
8. The granting of the title to the bed of the St. Lawrence river to the corporation.
9. The creation of an exclusive right in perpetuity, to the use of all the water power in Long Sault Rapids.
10. The provision for alleged reasonable and proper remuneration to the State for such exclusive privileges.

Members of the Legislature from an examination of the title of this bill would not expect to find such extraordinary and exclusive grants as contained therein. The title of the bill does not indicate that the right to take toll is given to the company; nor that the title to the bed of the St. Lawrence river is to be conveyed to the corporation. Development of water power in the river is readily accomplished without an appropriation or occupancy of the bed of the stream. The title of the bill does not indicate that the charter granted is perpetual. The same criticism applies in respect to the other provisions of the bill pointed out above.

THE BUFFALO HISTORY MUSEUM

The Court of Appeals, in Coxe v. The State, 144 N. Y. 396, declared unconstitutional, as violative of the provisions of the Constitution we are here considering, an act entitled: "An act to authorize the drainage of marsh lands" which granted privileges of an important character; constituted a corporation, to which it gave power to reclaim and drain, from time to time, wet or overflowed lands and tide-water marshes on or adjacent to Staten Island and Long Island. Power was also given to enter upon all lands and waters for the purpose of making surveys and to use and own the right and title of the State in and to all the lands under water that may lie within or between said dykes and the present shore line, upon the payment to the Treasurer of the State of such sum of money as should be determined by a commission to be appointed by the Governor, to be a fair value of such lands under water and belonging to the State. The Court of Appeals said at page 408, in speaking of this:

> "It created a private corporation and its operations affected four counties in the state. The subjects embraced in it were the creation of the corporation; the authority to drain and reclaim tide-water marsh lands; to levy and collect assessments; to exercise the power of eminent domain and the grant of lands belonging to the state. We have seen that the purpose of the act, as expressed in the title, was the authority to 'drain marsh lands.' Without inquiring whether any of these subjects are germane to, or so connected with the one expressed in the title as to escape the objection, it is quite clear that no citizen or member of the legislature would expect to find such an extraordinary grant from the state of lands under water in the body of a bill with such a title, and that is a fair test of the question."

The act of the Legislature condemned by the court in the above case was not more clearly violative of the provision of the Constitution under consideration than the act incorporating the Long Sault Development Company. Nothing in the title, as I have before stated, indicates that the company is to become the owner of land under water; is to be permitted, in connection with other companies or acting independently, to bridge the St.

THE BUFFALO HISTORY MUSEUM

Lawrence at that point; to have exclusive control in perpetuity of the waters in the vicinity of Long Sault island and above and below it; to charge toll, and to do the other numerous acts which, by the terms of the statute, it is permitted to do. For instance, the heading provides that one of the purposes of the act is "to improve navigation in the St. Lawrence," while there is nothing in the act to require the company to improve navigation, or to do anything more than is necessary to accomplish the purposes of its corporate existence, provided the navigation of the St. Lawrence is not injured. Many affirmative acts are to be performed by the company, every one in aid of its corporate purposes, not one for the improvement of navigation.

I believe, therefore, that this bill violates section 16 of article III of the Constitution of the State.

THE ACT IS INVALID AND INOPERATIVE SO FAR AS IT PROVIDES FOR THE ALIENATION BY THE STATE OF TITLE TO THE LANDS IN THE BED OF THE ST. LAWRENCE.

I think it is within the spirit of the resolution that I should also call the attention of your honorable body to the fact that the act in question is in excess of the power of the Legislature — in undertaking to divest the people of the State of the title to the lands under the St. Lawrence.

The act in question provides that after Congress shall authorize the construction of the dams, locks and canals authorized by the act, and after the payment by said corporation into the treasury of the State of the fixed sum of $10,000, the Commissioners of the Land Office shall, upon application of said corporation, grant unto it the title and interest of the people of the State in and to the lands under the waters of the St. Lawrence river, to be covered or occupied by said works and locks and power houses, etc.

Provision is herein made for the complete surrendering of the title of the people of the State to the company, upon its complying with the terms of the act. This, neither the Legislature nor the Board of Land Commissioners has power to do.

THE BUFFALO HISTORY MUSEUM

THE TITLE OF THE STATE OF NEW YORK TO LANDS UNDER NAVIGABLE WATERS IS A SOVEREIGN RIGHT RATHER THAN A PROPRIETARY TITLE.

The State holds such lands in trust for the benefit of the public and that trust the State is powerless to divest itself of. This doctrine has been clearly announced whenever the question has been before the courts, both in State and in federal tribunals, and is not open to doubt. In the case of Coxe v. The State, 144 N. Y. 396, a case very similar to this, the court announced this principle in the following language:

> "The question is governed in this state by the rules of common law, modified in some respects by statute and adapted by the courts to such changes of conditions as existed here. That the dominion and ownership of such lands (under navigable streams) is in the sovereign for the benefit of the public has long been settled. Such dominion and ownership of property generally implies the power of absolute disposition, but with respect to the land under navigable or tide waters an important limitation has been engrafted upon this power from the nature of the title. The title of the state to the seacoast and the shores of tidal rivers is different from the fee simple which an individual holds to an estate in lands. It is not a proprietary, but a sovereign right, and it has been frequently said that a trust is engrafted upon this title for the benefit of the public of which the state is powerless to divest itself."

The same doctrine is announced in People v. N. Y. & S. I. Ferry Co., 68 N. Y. 71, and numerous other cases.

The United States Supreme Court states the same doctrine in Illinois Central R. R. Co. v. Illinois, 146 U. S. 387. The court was there considering the validity of an act of the Illinois State Legislature, repealing a former act of that Legislature, which former act undertook to grant to the Illinois Central Railroad Company certain lands under the waters of Lake Michigan. Upon that point the court said:

> "The State holds the title to the lands under the navigable waters in trust for the people of the State that they may

THE BUFFALO HISTORY MUSEUM

enjoy the navigation of the waters, carry on commerce over them and have liberty of fishing therein, freed from the obstruction or interference of private parties. * * * The control of the State for the purposes of the trust can never be lost except as to such parcels as are used in promoting the interests of the public thereon or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. * * *

"The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace."

There are numerous other cases in the United States court holding the same principle.

The title to this land is not necessary for the enjoyment by the company of all of the power incident to the development of water and electrical power at that point. It is not a grant for any public use or in which the public at large is interested, or by which the public is benefited. It clearly, therefore, contravenes the very nature of the State's sovereign control in this respect.

It may be argued that this is not important at present, in that it does not arise until Congress has acted; and also, that the powers granted to the company, being capable of full enjoyment without the grant of the title to the bed of the stream, that therefore, to that extent the act may be sustained. As the court said in the Coxe case:

"The various provisions of the act are so mingled together and dependent upon each other, that it is not clear that any of them can stand independently."

I believe, therefore, that this act should be condemned also, because of the provision which provides for the grant of title in

THE BUFFALO HISTORY MUSEUM

the company of the bed of the St. Lawrence river at the point in question.

I believe, also, that this grant which is in excess of the power of the Legislature does not constitute an obligation on the part of the State toward the company, which is beyond the power of revocation by a subsequent Legislature.

THE REMEDY.

THE RESOLUTION FURTHER REQUESTS AN OPINION WHETHER OR NOT ANY PRESENT ACTION OR PROCEEDINGS MAY BE BROUGHT BY THE STATE TO ASCERTAIN JUDICIALLY WHETHER THE ACT IN QUESTION CONTRAVENES THE CONSTITUTION.

The grant made is ineffective until Congress shall authorize the construction of the dams, locks and canals authorized by the act. This is conceded by the act itself and is necessarily so, for the reason that the St. Lawrence is a national boundary, is a navigable river and is, aside from regulation by treaty between this government and Canada, subject to control for purposes of navigation and military defense by the United States government and Canada to the extent of their respective ownerships. In other words, the Federal control of the St. Lawrence river to the national boundary line is paramount to the control by the State for the purposes of navigation and military defense only. I believe it to be the law that the State cannot make a grant of a navigable river except subject to this paramount right of the Federal government, which right can only be enjoyed for the purpose of navigation and military defense.

Until, therefore, the Federal government, in conjunction with the Canadian government, or independently, shall recognize this grant as not interfering with the Federal use and control of the waters of the river at this point, the grant does not become effective. No legal proceedings, therefore, are necessary and it is not clear that any can be maintained in the courts to determine the constitutionality of that grant, especially as no power of

THE BUFFALO HISTORY MUSEUM

privilege can be exercised by the grantee concededly until the Federal government, through Congress, has authorized the construction of dams, locks and canals as authorized by the act. I believe, however, that the Legislature has power in this case either to repeal the act or to direct the Attorney-General to bring an action to procure a judgment vacating and annulling the act of incorporation. The latter power of the Legislature can be exercised only if the Legislature reaches the conclusion that the act was procured by fraudulent suggestion or the concealment of a material fact made by or with the knowledge and consent of the persons, or any of them, incorporated. (Section 130, General Corporation Law.)

The power of the Legislature to repeal an act passed by a former Legislature, when deemed in conflict with the Constitution, I think is unquestioned. It has been exercised in the past by the Legislature with the approval of the court. Chapter 257 of the Laws of 1875 repealed a grant of land under water made by a previous Legislature. This act was before the court in Coxe v. The State, 144 N. Y. 391. At page 403 the court discusses the terms of the repealing act and assumes that it was within the legislative power. In that case no question was made even by the corporation affected of the power of the Legislature to repeal the grant. In Illinois Central Railroad Company against Illinois, 146 U. S. Reports, 387, the United States Supreme Court held valid and effective an act of the Legislature of the State of Illinois repealing an act of a former Legislature undertaking to grant to the Illinois Central Railroad Company the right and title of the State of Illinois in and to the submerged lands constituting the bed of Lake Michigan and lying east of the tracks and breakwater of the Illinois Central Railroad for the distance of one mile. The court in that case held the principle that is contended for in this opinion, that this grant exceeded the power of the Legislature in that the State could not alienate to a corporation its ownership and control of lands under navigable waters but held them in trust for the people, and that to that extent the act of the Legislature was invalid and the repealing act was valid and effective.

THE BUFFALO HISTORY MUSEUM

CONCLUSION.

It is my opinion, therefore, that the powers and privileges granted the Long Sault Development Company by chapter 355 of the Laws of 1907 was an invalid and unauthorized grant for the reasons:

1. That the act in question is unconstitutional in that it contravenes section 18 of article III of the State Constitution, which provides that the Legislature shall not pass a private or local bill granting to any private corporation, association or individual any exclusive privilege, immunity or franchise whatever. This bill is private and local and grants an exclusive privilege, as contemplated by section 18 of article III of the Constitution.

2. It violates section 7 of article VII of the State Constitution, which provides that the lands of the State now owned or hereafter acquired, constituting the Forest Preserve, as now fixed by law, shall be forever kept as wild forest lands, and shall not be leased, sold or exchanged, or taken by any corporation, public or private.

The bed of the St. Lawrence river, which, by the act in question, is directed to be conveyed to the Long Sault Development Company, is owned by the State and was so owned at the time the provision of the Constitution was adopted, and was included within the Forest Preserve, as defined by section 100 of chapter 332 of the Laws of 1893, describing the lands included within the State Forest Preserve.

3. The act in question is a private bill and embraces more than one subject, and is, therefore, in violation of article III, section 16, of the State Constitution, which provides that no private or local bill which may be passed by the Legislature shall embrace more than one subject, and that shall be expressed in its title.

4. The act is invalid as being in excess of the powers of the Legislature, in that it provides for the alienation by the State to the Long Sault Development Company of title to the lands in the bed of the St. Lawrence river. The title of the State in these lands is a sovereign right, rather than a proprietary title. It is inconsistent with that right, which must be exercised for the benefit of the whole people, that the title to the bed of a navigable stream should be granted in fee to a private corporation.

THE BUFFALO HISTORY MUSEUM

I do not deem it within the scope of the resolution that I should call the attention of your honorable body to the great disparity between the value of the rights and privileges undertaken to be granted to the Long Sault Development Company, and the revenue therefrom reserved to the State. While that is not the least striking provision of this most remarkable grant, yet it is a question of policy and of economy which it is competent for the Legislature to determine, and is not, I deem it, a question upon which the Legislature desires or needs my opinion.

All of which is respectfully submitted,

THOMAS CARMODY,
Attorney-General.

To the Honorable, the Senate of the State of New York.

Dated, December 30, 1912.

THE BUFFALO HISTORY MUSEUM

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STATE OF NEW YORK

OFFICE OF THE ATTORNEY-GENERAL

OPINION

Rendered to the Governor Relative to the

Surplus Waters at the Troy Dam

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OPINION RENDERED TO THE GOVERNOR RELATIVE TO THE SURPLUS WATERS AT THE TROY DAM.

TROY DAM — SURPLUS WATERS IN NAVIGABLE RIVERS.

The leases made by the State of New York for the use of the surplus waters at the east and west ends of the Troy dam cannot be rescinded or terminated by the State without the consent of the lessees, so long as the dam where the power is generated remains.

The action of the Canal Board on November 22, 1910, in undertaking to rescind these contracts by resolution, was therefore ineffective for the purpose of terminating the leases.

The State of New York is the absolute owner of the navigable rivers within its borders and is the owner of all the waters therein and of the power developed from such waters. This ownership the Canal Board has no power to relinquish.

Congress has power, by subdivision 3 of section 8, of article I of the Constitution of the United States, to enter the navigable streams of the State for the purpose of regulating commerce with foreign nations and among the several States. It may, in utilizing this power, construct dams and locks, but has no right to sell the power developed thereby, or to use any more than is necessary to operate the works thus created.

OPINION.

1. The leases made by the State of New York for the use of the surplus water taken from the east and west ends of the Troy dam are for the term of 999 years, and provide for the payment of annual rentals. The leases reserve to the State the right "wholly to resume the waters hereby conveyed and the privilege hereby granted, and to control and limit the use of said water and privileges, whenever in the opinion of the Canal Board or of the Legislature, the necessary supply of water for use in any State canal, or the safety of such canal or waters connected therewith, shall render such resumption, control or limitation necessary. * * * Also saving and reserving to the said parties of the first part (the State) the right, without making any compensation to the said parties of the second part or any other person claiming under them, wholly to abandon or destroy the work by the construction of which the said surplus water has been created, when, in the opinion of the Canal Commissioners, the occupation and use of said work shall cease to be advantageous to the State."

THE BUFFALO HISTORY MUSEUM

These provisions contemplate that the leases shall continue as long as the power continues, and that the use of the power can only be terminated by the State by the abandonment or destruction of the dam itself, when such act shall be deemed advantageous to the State, or when, in the opinion of the Canal Board or the Legislature, it is necessary to resume the waters for the use or safety of the canals or works connected therewith.

The Canal Board, on November 22, 1910, undertook to rescind these contracts, under the following resolutions:

> "Resolved, That it is the opinion of this board that the whole of the surplus water created by said dam and lock is now necessary for the use of the canals of the state and the works connected therewith, authorized and directed by said Chapter 147 of the Laws of 1903, and the acts amendatory thereof and supplemental thereto, and that the said surplus water be, and the same hereby is, wholly resumed; and be it further
>
> Resolved, That the said dam and lock, by the construction of which the said surplus water has been created, be, and the same hereby are, abandoned, and the destruction of the same be, and the same is, hereby authorized; and be it further
>
> Resolved, That the superintendent of Public Works be, and he hereby is, directed to serve a copy of this resolution upon the said lessees, their successors or assigns."

No notice was given the lessees of the intention of the State to resume the surplus waters of the Troy dam. This resolution was not followed up by any act of the State looking toward the destruction of the dam.

A brief history of the events leading up to this resolution is important, that its meaning may be understood.

On January 10, 1910, a report was submitted by Col. W. M. Black, of the Corps of Engineers of the War Department of the National Government, through W. L. Marshall, Chief of Engineers, on the improvement of the Hudson river in and about Troy and Waterford, referring to the leases in question, recommending their termination by the State and the construction of a new dam.

This report appears at pages 15 and 26, inclusive, in House Document No. 719. At pages 18 and 19 the report states:

THE BUFFALO HISTORY MUSEUM

" It is probable that, when the new dam is built, there will be surplus water sufficient to develop at least about 1400 horse power, which should be utilized. A small portion of this can be used for operating and lighting the lock. The remainder can be sold. It will be noted that the abandonment of the existing structure by the State extinguishes these leases automatically. The legal successors of the Canal Commissioners are the Canal Board. I am informed that this body is ready to abandon the dam as soon as the United States can construct a new lock and dam. The proposed change in location of the dam would not prevent the continued use of the surplus water for obtaining power by these establishments (the present lessees), for a flume can be constructed to supply it. New and mutually advantageous arrangements can be made, if desired, with the owners of these establishments, for this purpose. Or, since the removal of the site makes it possible to locate other new establishments in a position which would make it possible to utilize the power with other parties; in other words, the change in location of the dam would not destroy any vested rights for the use of the power developed, nor would such removal prevent the present users from continuing its use. It would, however, place the government in a position to obtain an adequate return for such power. Time has not permitted an estimate of the cost for the flume to be made. If the United States decides to undertake the construction of the lock and dam, the Secretary of War should be authorized to purchase, by condemnation or otherwise, under the general statutes of the State of New York, the real property necessary for the improvement, *and also to grant leases or licenses for the use of the surplus water for water power created by the dam, at such a rate, and on such conditions, and for such periods of time as may seem to him just, equitable and expedient, the said leases or licenses to be limited to the use of the surplus water not required for navigation and to a period not exceeding twenty years; for the occupation of such land belonging to the United States on the Hudson river, as may be required for power flumes or other industrial purposes, not inconsistent with the requirements of*

THE BUFFALO HISTORY MUSEUM

navigation, and to construct such work or works appertaining to the dam as may be necessary for the development and use of such water power."

It is apparently pursuant to this recommendation that the Canal Board undertook to terminate the leases in question. It will be seen from this report that the immediate destruction of the power was not contemplated, but that the United States was to be substituted for the State of New York as lessors, the dam to be continued for the present, and "new and mutually advantageous arrangements made, if desired, with the owners of these easements (the lessees)."

It is further contemplated by this report that power flumes be constructed and such work or works as may be necessary for the development and use of the water power, and that the United States, when the structure is completed, shall be the owner of the water power developed and shall grant leases for the use of the surplus water, at such rate and on such conditions and for such periods as to it may seem just, equitable and expedient.

This report was submitted to the Secretary of War by the Chief of Engineers on February 24, 1910. The Chief of Engineers, in submitting the report, uses this language:

> "The district officer states that it is probable that there will be surplus water sufficient to develop at least about 1400 horse power at the new dam, a small portion of which can be used for operating and lighting the lock, and the remainder can be sold. He (Col. Black) recommends that, if the improvement be adopted, the Secretary of War be authorized to grant leases or licenses for the use of the surplus water, for water power created by the dam, at such a rate and on such conditions and for such periods of time, as may be just, equitable and expedient, the said leases or licenses to be limited to the use of the surplus water not required for navigation and to a period not exceeding twenty years."

It further approves of the recommendation of Col. Black for the construction of power flumes and for the construction of such work or works appertaining to the dam as may be necessary for the development and use of said water power.

THE BUFFALO HISTORY MUSEUM

It will be seen, therefore, that the work of improving the Hudson river at this point was initiated with the purpose held out to the National Government of acquiring the surplus waters at the Troy dam and disposing of the same either to the present lessees or to other lessees, the revenues from which to belong to the United States Government.

The appropriation in the River and Harbor Bill for the improvement of the Hudson at this point seems to have been made with the view of carrying out the recommendation of acquiring the surplus waters by the National Government. The appropriation is made with this proviso:

> "That the expenditure of the amounts herein and hereafter appropriated for said improvement, shall be subject to the conditions set forth in said document."

This refers to Document No. 719, which contains the report of Col. Black and of the Chief of Engineers.

The action of the Canal Board in attempting to rescind the leases was recommended by Col. Black and was a step in the consummation of the purpose of the National Government to build the dam and control the water power.

The action of the Canal Board, therefore, was not pursuant to the terms of the leases themselves, but for an entirely different purpose, and one which I believe the law does not sustain.

The title to the bed of navigable streams and to the waters therein is in the State and cannot be released or ceded to the National Government by the Canal Board, directly or indirectly.

In *People* v. *Tibbitts,* 1 N. Y. 523, the ownership of the surplus waters of the Troy dam was under consideration by the court. The action was brought against one Tibbitts, a son of one of the original lessees, to recover rent reserved in the lease. The defendant claimed that he was the riparian owner and therefore the owner of the surplus waters mentioned in the lease, and hence that the covenants contained in the lease on the part of the lessee were without consideration and could not be enforced. The court says, at page 528:

THE BUFFALO HISTORY MUSEUM

> "It is beyond dispute that the State is the absolute owner of the navigable rivers within its borders, and that as such owner, it can dispose of them to the exclusion of the riparian owners.
>
> "In this case, the State exercised its power of disposition in making the lease and consequently such lease is valid."

In *Knight* v. *United Lands Association,* 142 U. S. 161, Mr. Justice Lamar, delivering the opinion of the United States Supreme Court, said:

> "It is the settled rule of law in this court that absolute property in, and dominion and sovereignty over, the soils under the tide waters in the original states were reserved to the several states, and that the new states since admitted have the same rights, sovereignty and jurisdiction in that behalf, as the original states possess, within their respective borders."

In *Illinois Railroad Company* v. *People,* 146 U. S. 387, the court said:

> "It is the settled rule of this country that the ownership of, and dominion and sovereignty over, lands covered by tide waters within the limits of the several states belong to the respective states within which they are found, and with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation, so far as may be necessary for the regulation of commerce with foreign nations and among the states. This doctrine has often been announced by this court and is not questioned by counsel of any of the parties."

This sets forth beyond question the legal principle that covers the ownership of the surplus waters. Congress may enter the Hudson river or any other navigable stream in the State, but only for the purpose of regulating and improving commerce. To this end it may erect dams and locks, but if power be generated

THE BUFFALO HISTORY MUSEUM

thereby, this power does not belong to the United States Government, as it is not an incident to the exercise of the right, on behalf of the National Government, of improving or regulating commerce.

A further criticism may be made of the action of the Canal Board in undertaking to rescind these leases. The canals of the State must be operated by the State, and this power cannot be delegated.

The Constitution of 1894, article VII, section 8, provides:

> "The legislature shall not sell, lease or otherwise dispose of the Erie canal, the Oswego canal, the Champlain canal, the Cayuga and Seneca canal, or the Black River canal, but they shall remain the property of the state and under its management forever."

I repeat that all that the State can yield to the National Government is that which the National Government itself possesses, namely: the right to enter for the purpose of improving or regulating commerce, and for no other purpose whatever.

If the plan outlined by Col. Black, pursuant to which the appropriation in this case is made, contemplates the control and management of this portion of the canal, or contemplates the development and sale of water power from surplus waters at that point, to this extent the project invades the rights of the State of New York, both to control the canals and to own and dispose of the surplus waters in the canals and in the Hudson river at this point.

I conclude, therefore:

1. That the action of the Canal Board, in undertaking to terminate the leases above referred to, was without force and effect, and that the action of the present Canal Board, in rescinding those proceedings, was legal and necessary for the purpose of maintaining and conserving the contract rights of the State and the lessees.

2. That, while the National Government has power to enter the Hudson river at this point and to build a dam, this can only be done in the interest of navigation, and not for the purpose of conserving and disposing of the surplus waters or the power generated therefrom.

THE BUFFALO HISTORY MUSEUM

3. That the surplus waters and the power generated therefrom belong to the State of New York and cannot be yielded to the National Government by the Canal Board; that, if Congress, by the construction of this dam, develops power, the title to it is in the State of New York.

It would seem, however, as if there need be no conflict of authority in carrying on this work. The appropriation by Congress may be expended as contemplated by the Constitution in the interest of navigation, in dredging the river, and in improving it and maintaining it for the benefit of the commerce that passes through it. The State may be allowed to retain control of the canal, and inasmuch as the State is the owner of all the surplus waters, both in the canal and in the river, it would seem as if the State should be permitted to construct this dam and have the control thereof and make leases for the use of the power generated thereby. Any other condition would bring a conflict of authority and confusion of rights and many embarrassments to navigation.

Dated Albany, May 10, 1911.

THOMAS CARMODY,
Attorney-General.

To Hon. JOHN A. DIX, *Governor, Albany, N. Y.*

BARGE CANAL — SURPLUS WATERS — LEASES.
Validity of lease of Hydraulic Race Company at Lockport.

MARCH 6, 1911.

To the Honorable the Canal Board, Albany, N. Y.:

GENTLEMEN.— By communication, bearing date February 6, 1911, your secretary calls my attention to the following extract from your proceedings had February 2, 1911:

"The Secretary presented a communication from the Thompson Milling Co. of Lockport, N. Y., relative to the surplus water leases at Lockport.

Upon motion the communication was referred to the Attorney-General for investigation and report to the Board."

The communication in question, accompanying the letter of your secretary, requested information as to the present status of

THE BUFFALO HISTORY MUSEUM

what is known as the Lockport Hydraulic Company's water leases. It states that the Hydraulic Power Company has been selling the surplus waters of the Erie canal to manufacturers of Lockport in an amount estimated at 5,000 h.p., for which it has been paying to the State the sum of $200 annually; that these waters have been sold by the Hydraulic Power Company at various prices, the present asking price being $12.50 per horse power.

The communication also states that the Public Works Department "concluded some years ago that the State should have greater compensation for this water, and for the protection of the State canceled the Hydraulic Race Co.'s leases on December 31, 1908, but since that time the Hydraulic Race Company has been continuing to make use of the water but has made no compensation therefor for the reason that the State has refused to accept its $200.00 annually for the reason that to do so would revive the lease and neutralize the effect of the State's cancellation of same."

The communication also charges the Hydraulic Race Company with rapacity in its charges and with securing large profits from companies from the retailing of water power obtained from the State.

I have endeavored to make a careful investigation as requested by your Board so that I might intelligently advise you upon the questions submitted. The solution of the inquiry as to what the present status of the Hydraulic Power Company is in connection with the surplus water of the State involves a consideration, in the first place, of the rights which were obtained by their original grantors and what, if any, was the effect upon these rights of the attempted revocation thereof by the Superintendent of Public Works in 1908.

The construction of the Erie canal was completed in the year 1825. At that time, and ever since, it has been the policy of the State, in order to promote manufacturing and commercial industries along the line of the canal to permit the use of the water powers created by its construction and operation by owners of lands adjacent to the water powers so created. The policy was evidenced by the enactment of chapter 275 of the Laws of 1825, which provided:

THE BUFFALO HISTORY MUSEUM

"That, whenever, in the opinion of the canal commissioners, any water may be spared from either the Erie or Champlain canal * * * without injury to the navigation or safety thereof, in which case the canal commissioners are authorized to *lease* the said waters to such person or persons as may be willing to give the highest annual rent therefor, reserving, however, in the lease to be given, the right to limit, control or wholly resume the said waters, and all the rights granted by any such lease, whatever, in the opinion of said commissioners, or of the legislature, the safety of such canals or works, or the necessary supply of water for the navigation of any canal * * * render such limitation, control or resumption necessary; and whenever any lease for waters as aforesaid shall be executed, the rent reserved therein shall be required to be paid over annually to the commissioners of the canal fund; and if, at any time, such rent shall remain unpaid for one year after the same shall become due, in that case the said lease shall be forfeited to the state."

The statute further provided that in case of the resumption of the waters by the State authorities no damage or compensation should be paid or allowed to any person or persons who may have made any improvement or erections in consequence of any such grants or leases.

Acting under authority of this statute, the Canal Commissioners did, on the 25th day of January, 1826, execute a grant and lease to Richard Kennedy and Junius H. Hatch of all the surplus waters which, without injury to the navigation or security of the canal, might be spared from the canal at the head of the locks in Lockport, to be taken and drawn from the canal at such places and in such manner, and to be discharged into the lower level at such places and in such manner, as the canal commissioners shall from time to time deem most advisable for the security of the canal and for the convenience thereof.

The annual rent reserved was the sum of $200 and the lease contained the same provision that was contained in the statute to the effect that the Canal Commissioners reserved to themselves and to the Legislature the right to limit, control or wholly resume the said waters and all the rights granted by said lease when, in the opinion of the Canal Commissioners or of the Legislature, the safety of the canal or its appendages, or the necessary supply of water for the navigation of the canal, shall render such limitation, control or resumption necessary.

After the execution of said lease a raceway was constructed connecting the higher and the lower levels of the canal and conveying the waters around the locks. These waters were utilized

THE BUFFALO HISTORY MUSEUM

by various manufacturing industries to whom were granted from time to time by the lessees perpetual rights for the use of certain portions of the waters upon the payment of certain sums of money. On account of this utilization of the water power a large manufacturing industry was developed and a thriving and prosperous community grew up at this location as a result of the policy of the State thus carried into effect.

The lease does not purport by its terms to express any length of duration, and there being no limitation of time, and taking into consideration the purpose for which the lease was executed, it is quite clear that it was meant to be perpetual, subject to the payment of rent and forfeiture for nonpayment of rent where the arrearage existed for a space of one year, but at all times subject to the paramount right of the State to restrict the use of the water or to entirely resume the same in case the safety of the canal or the purpose of navigation require such resumption.

I find that in a partition action brought in the Supreme Court a judgment was entered, on the 27th day of August, 1851, in an action, entitled "William S. Marcy and another against Lyman A. Spaulding and others," the rights of the various parties to the use of these waters as between themselves were adjudicated and their several rights expressly limited and defined by the court.

That this was a perpetual lease, subject to forfeiture, restriction and resumption, as above indicated, and was plainly so considered by the Legislature, is shown by chapter 42 of the Laws of 1858, "An act in relation to Lockport Hydraulic Company," the predecessor of the present Hydraulic Race Company. This statute authorized the company in question to purchase and hold in fee simple any real estate contiguous to the mill race belonging to said company and between said race and the Erie canal. It also provided that the company might dispose of any of its real estate and rights of water to other corporations for manufacturing purposes by grant or lease, and provided that leases having more than ten years to run should contain a condition permitting the lessee to terminate the same and make his *title absolute* on his paying to the lessors a principal sum which at 7 per cent. interest shall yield a yearly income equal to the annual rent

THE BUFFALO HISTORY MUSEUM

reserved in such lease. This act further provided that " in lieu of the yearly rent now payable to the State on *perpetual lease* of the surplus waters at Lockport " granted to Kennedy & Hatch, it should be lawful for the company, as assignee of the lease, to pay into the State treasury a principal sum on which the interest at 6 per cent. per annum should be equal to the annual rent and upon such payment the company should be released from further payment of rent, but neither the payment nor the release should be considered to impair the right reserved to the Canal Commissioners or the Legislature to limit, control or wholly resume the rights granted by said lease.

In January, 1906, the Appellate Division of the Supreme Court in this department had cause to consider the legal effect of an instrument identically similar to the one here under consideration, in the case of the *People* v. *Freeman,* 110 A. D. 605, and in that case the court went so far as to hold that notwithstanding the fact that the lessee was in default for the payment of rent for over fifty years, inasmuch as no forfeiture was had of the lease, the defendant had a right by a tender of the rent, prior to the commencement of the action, to prevent any action for forfeiture being maintained on that ground.

Later in the same year, the Attorney-General was requested to give his opinion as to the rights of the parties using the surplus waters in the canal at Lockport. In response to such request the following communication was submitted to the Canal Board:

" STATE OF NEW YORK,
ATTORNEY-GENERAL'S OFFICE,
ALBANY. *November* 26, 1906.

WILLAM G. SHAIBLE, Esq., *Secretary Canal Board, Albany, N. Y.:*

" DEAR SIR.— I have your letter of November 21, referring to a resolution of the Canal Board asking the opinion of the Attorney-General as to the rights of parties using surplus waters of the canal at Lockport, by virtue of leases made many years ago and also as to the right of the Canal Board to cancel said leases. In reply thereto would say that I am of the opinion that the Canal Board would have no right to cancel these leases so long as the rent stipulated therein is paid. (*People* v. *Freeman*, 110 App. Div. 605.)

Yours respectfully,
GEO. E. PIERCE,
Deputy Attorney-General in Charge."

(See proceedings of Canal Board for 1906.)

It is quite clear that the lease in question was perpetual, subject to be forfeited by nonpayment of rent, and subject to the

THE BUFFALO HISTORY MUSEUM

right of the State to resume the waters and the rights conveyed under the conditions stated.

The effect of the order of revocation, issued by the Superintendent of Public Works under date of November 25, 1908, remains to be considered.

It is evident that whatever powers were vested in the Canal Commissioners to revoke the lease were succeeded to by the Superintendent of Public Works. The action taken by the Superintendent of Public Works was the result of a resolution by the Canal Board, presented by him, and adopted November 24, 1908. This resolution recited

"That it is the opinion of this Board that the safety of the canal and its appendages and the necessary supply of water for the navigation of the canal, render necessary the cancellation and termination, on the 31st day of December, 1908, of a certain indenture or lease made on the 25th day of January in the year 1826, between the Canal Commissioners of the State of New York of the first part, and Richard Kennedy, of the Town of Lockport and Junius H. Hatch of the City of New York, of the second part."

The resolution requested the Superintendent of Public Works to serve notice upon the lessees of the cancellation and termination of the lease, and requested the Comptroller to receive no rental beyond such date.

Following the recommendation of the Canal Board, the Superintendent of Public Works, on the next day, issued the revocation order. This order recited, among other things, the following:

"Upon careful consideration of all the facts and the conditions which led to the recommendations of the Canal Board in favor of the cancellation of said lease, the undersigned, the Superintendent of Public Works, is of the opinion that the safety of the canal and is appendages render the control of the waters of the Erie Canal and their resumption by the State as necessary."

It will be observed that both in the resolution of the Canal Board and in the order of the Superintendent of Public Works there was an attempt to follow the phraseology of the statute, and recitals were inserted to the effect that the action taken was necessary, for the protection of the navigation of the canal, as stated in the resolution of the Canal Board, and necessary for the safety of the canal, as stated in the order of the Superintendent.

From an examination of the history of the policy of the State and the legislation enacted pursuant thereto, and bearing in mind

THE BUFFALO HISTORY MUSEUM

the conditions existing, I am most clearly of the opinion that the lease could not be cancelled by any official action containing any recital however strong and solemn, and that, notwithstanding any such official action, which went no further than the adoption of resolutions or the issuing of orders the lease is still outstanding in full force and effect.

This case is typical of many others, where large industries have grown up, where large investments of capital have been made, where flourishing and thriving communities have been created, where employment has been given to the laborer, and means of livelihood provided for many of our citizens. I cannot believe that this condition can be overthrown and destroyed by action of any public body, however good may be the intentions which actuated any such official action.

If power there existed at any time, by recital of conditions, in any body or officer to cancel these rights, such power might be exerted from the worst of motives and for the most arbitrary and inappropriate of reasons. During all the eighty-five years of the continuance of this lease it has been subservient to the paramount rights of the State to use the waters for the purpose of the canal. It is now so subservient. During all these years the State authorities had a right at any time to resume, in whole or in part, the waters of the canal, and such right still exists, but I believe that the action of the Canal Board and the action of the Superintendent of Public Works, in merely reciting by resolution and order, that it was necessary to resume the waters, when in fact it was unnecessary, when in fact they have never been resumed, when in fact there is no likelihood of their being resumed, does not cancel the lease or in any way impair the rights of the assignees of the lessees.

This lease was made at a time when the locality was almost uninhabited. The annual rental, which now seems small, was fixed after computation, under the laws of 1825, and awarded to the highest bidder. Acting upon faith in the agreement by the State, an investment large for that time was made and investments still larger have been made from year to year.

There would perhaps be a pecuniary gain if a revocation were made by the State and provision made for the disposal of the

THE BUFFALO HISTORY MUSEUM

waters for a higher revenue, but, in my opinion, it would be a pecuniary gain at the cost of good faith and would be in violation of not only the legal but the moral rights of the successors of the lessees.

In response, therefore, to the request for information submitted in the communication of your Honorable Body as to the present status of the Hydraulic Race Company's lease at Lockport, to me, I beg leave to advise you that, in my opinion, as a matter of law, the lease in question is of full force and validity, and that so long as there are surplus waters in excess of those necessary for the navigation and safety of the canal, running around the locks at Lockport, the assignees of the lessees are entitled to the use thereof upon payment of the annual rental prescribed by the lease.

In expressing this opinion, however, I do not in any manner wish to be understood as advising against the right of the State, at any and all times, to resume, in whole or in part, the use of such waters but until such resumption occurs as a physical fact, I believe that the rights of the successors to the lessees are unaffected by the adoption of any resolution or by the issuance of any official order.

Yours very truly,

THOMAS CARMODY,

Attorney-General.

THE BUFFALO HISTORY MUSEUM

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State of New York
Office of the Attorney-General

MEMORANDUM

ON

Federal Regulation of Water Power Within New York State

THE BUFFALO HISTORY MUSEUM

THE
BUFFALO
HISTORY
MUSEUM

MEMORANDUM ON FEDERAL REGULATIONS OF WATER POWER WITHIN NEW YORK STATE.

General Powers of the United States Government and State Government in Respect to the Conservation and Use of Water Power.

SURPLUS WATERS — FEDERAL GOVERNMENT — TROY DAM.

The theory that the Federal Government has the right to dispose and sell the surplus water power of New York State is not within the enumerated powers granted to it by the United States Constitution, because:

(1) It is a governmental function belonging to the State of New York to conserve and make use of its natural resources, including the water of its rivers, except to the extent that it can not impede commerce or navigation of navigable streams.

(2) The Federal Government is not authorized to engage in a business of manufacturing, transmitting, or selling electrical energy, whether at cost or for a profit.

(3) The Constitution merely permits regulation in the interest of navigation and commerce by the Federal Government. *Regulation* does not mean the *appropriation* or confiscation of the proprietary rights of a State in its natural resources.

(4) In so acting, the Federal Government attempts to enlarge the power of taxation granted to it by the States. Such appropriations of the State's natural resources would necessarily result in the diminution of the taxable property of the State, retard its commercial and material prosperity and lacks the uniformity required in all systems of Federal taxation.

(5) The Commerce Clause of the United States Constitution in no way authorizes the appropriation by the Federal Government of the State's natural resources. It merely permits regulation of navigable waters to the extent necessary and requisite to advance and promote commerce and navigation. For reimbursement to the National Government for such improvement, the States have granted to the Federal Government a limited power of taxation.

(6) The contemplated confiscation of State property can not be justified as an act of conservation of natural resources by the Federal Government. The Federal Government is limited in its policy of conservation to conserving the national public domain. The territory within the geographical limits of the State, not ceded or owned by the United States, must be conserved by a policy inaugurated by and through means employed by the respective States and not by the Federal Government.

(7) The contemplated appropriation by the Federal Government shows an entire disregard for State rights in that it arrogates to the Federal Government the State's sovereign and proprietary rights and attempts, by unconstitutional legislation, to limit the full ownership and control which exclusively belongs to the State, subject only to the paramount right of the Federal Government to regulate commerce.

THE BUFFALO HISTORY MUSEUM

MEMORANDUM.

It is unnecessary to cite authorities in stating the elementary proposition that the Federal Government is one of merely limited, enumerated powers granted to it by the respective States. Such powers are expressed in the language of the Constitution itself.

The powers of the Federal Government are limited in their scope. The United States Government was created for special purposes; beyond the scope of its powers it has no existence.

The States of the Union are sovereign States. The people of each State compose a State having its own government and endowed with all the functions essential to a separate and independent existence. Independently of the grants and prohibitions of the Constitution, each State was and is "a single sovereign power;" a nation over whom no external power can exercise control; whose jurisdiction is necessarily exclusive and absolute within its own boundaries and susceptible of no limitation not imposed by itself by a grant or concession to the government of the Union.

The contemplated interference and confiscation by the Federal Government of the water powers of New York State is attempted to be justified under the Commerce Clause of the Constitution, Art. 1, sec. 8, cl. 3. The true reason and motive behind the federal movement is the present and somewhat prevalent theory of conservation of natural resources.

No criticism is made of the principle of conservation, if properly understood and confined within the proper limits and boundaries of its exercise by the respective governments of the United States and of the respective States.

Conservation by federal authority must be limited to the natural resources which are owned and exclusively controlled by the United States Federal Government. Such federal conservation is for the interest of the whole people of the United States, for the purpose of carrying out the powers and functions delegated to the Federal Government in the interest of the entire people. The reforestation of public lands of the United States; the regulation of mining and use of government-owned lands, as

THE BUFFALO HISTORY MUSEUM

Alaska and property in certain States and territories within the United States, are properly subjects for federal legislation tending towards the conservation of the natural resources therein.

But on the other hand, federal interference with the natural resources of a State is not authorized nor permitted under our system of Constitutional Government, except in the aid of the enumerated powers ceded by the sovereign States to the Federal Government.

Conservation of the natural resources of the respective States is a governmental function, a power not granted to the Federal Government among its enumerated powers and is consequently, necessarily reserved to the States. The natural resources within the geographical boundaries of the State, such as its mining wealth, its timber and its water power — whether developed or undeveloped — is, beyond dispute, a part of the sovereign territory of the State and beyond interference or regulation through the Federal Government except as necessarily required to advance and carry out some of the enumerated powers and governmental functions granted to the United States in the Constitution.

The distinction is to be noted between the Federal Government's control over lands within the geographical boundaries of the original thirteen States as distinguished from the other States.

All other property of the United States, except the thirteen original States, was acquired either through purchase or cession, and until the States had been carved or erected out of such purchased territory, the absolute dominion, ownership and title to such territory was lodged in the Federal Government.

The Federal Government, over such public domain, had the right to grant homesteads, mining rights and to deal with such territory in every manner as might an individual proprietor. In such territory the Federal Government could dispose of land under water and rights in navigable waters.

The situation of the Federal Government as regards the original thirteen States was that the central government secured only such rights over their territory as were expressly delegated and granted to it by the Constitution. As regards the newer States, the situation was just the reverse. The government of

THE BUFFALO HISTORY MUSEUM

the newer States received only such territory over which they could exercise proprietary rights, as had not been granted away or encumbered by the Federal Government, prior to the creation of the new State.

Federal Interference or Control of Water Power on Navigable Rivers only Extends to the Extent of Preserving the Navigability of the Stream or Its Proper Use for the Purposes of Navigation.

Any attempted federal regulation or control that is not within its constitutional grant is illegal, null and void.

The courts have the right to judicially review any determination by Congress that certain legislation falls within the Commerce Clause. Whether it is within or without the constitutional authority of Congress is a judicial question for the courts.

In the case of *C. B. & Q. R. R. Co.* v. *Drainage Commissioners,* 200 U. S. 561, the court holds:

> "If the means employed have no real substantial relation to public objects which Government may legally accomplish; if they are arbitrary and unreasonable, beyond the necessities of the case, the judiciary will disregard mere forms and interfere for the protection of rights injuriously affected by such illegal action."

The congressional action under the Commerce Clause is limited in its exercise to navigable rivers or natural streams, which form an interstate highway commerce. Other navigable streams which do not flow to the sea and are wholly within the State are outside of congressional control, even for the purpose of assisting and aiding commerce and navigation.

The question of government control is based upon and measured by the principles which control the case of highways. The United States Supreme Court, quoting and approving Chancellor Kent in the case of *Grand Rapids Co.* v. *Butler,* 159 U. S. 87, says:

> "Under the Common Law the public easement of navigation bears a perfect resemblance to public highways."

The Commerce Clause was never intended to grant to the Federal Government the power to secure revenue or profit as an

THE BUFFALO HISTORY MUSEUM

incident to increasing the facilities of navigation and commerce in a navigable river, particularly when such source of profit or revenue is secured from the use of the property rights of the States themselves or the citizens thereof. The power to aid navigation and commerce gives to the Federal Government, the authority to construct in navigable rivers such structural improvements in the way of dams, bridges, etc., as may properly improve the navigation of the river. This is a paramount right to which the State and the citizens thereof must yield.

Nor can the Federal Government justify its appropriation of the natural resources of the State under its power to make regulations regarding the territory or other property belonging to the United States.

This federal power is contained in section 3, article 4 of the Constitution, as follows:

> "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this statute shall be so construed as to prejudice any claims of the United States or of any particular state."

This clause is primarily a grant of power to the United States of control over its own property. Such is implied by the words "territory or other property." Certainly this clause does not grant to Congress any legislative control over the States and must, so far as they are concerned, be limited to authority over the property belonging to the United States within their limits.

Kansas v. *Colorado,* 206 U. S. 46, 88.

Nor can the attempted appropriation be justified as within the admiralty powers of Congress. In *United States* v. *Bevans,* 3 Wheaton (16 U. S.), 336, it was held:

> "The grant to the United States in the Constitution of all cases of admiralty and maritime jurisdiction does not extend to a cession of the waters in which those cases may arise, or all general jurisdiction over the same. Congress may pass all laws which are necessary for giving the most complete effect to the exercise of the admiralty and maritime jurisdiction granted to the government of the Union: But

THE BUFFALO HISTORY MUSEUM

> the general jurisdiction over the place, subject to this grant, adheres to the territory as a portion of territory not yet given away; and the residuary powers of legislation still remain in the State."

The Federal Government has a right to make use of navigable waterways solely for the purposes of navigation. The State also has the same power until action is taken by Congress in regard to commerce and in addition.

The State, however, has a further right to make such use of all its waterways through and by such means as it may deem proper, expedient and necessary to conserve and enlarge the water powers therein and to make such potential energy available to the greatest possible number of its citizens upon equal opportunities and privileges. This is the proper governmental function of conservation by the State of its natural resources.

The Conservation of Water Power and Other Natural Resources is a Governmental Function of the State.

Conservation permits the intervention of the State in the process of industrial utilization of natural resources in order to prevent a waste (before which the sovereign power is helpless). The conservation of water power must involve the idea of use. In the last twenty years there has been a tremendous extension of the use of water power in the State of New York. This has resulted from the possibilities of hydro-electric development. As a result of the transmission of power by electricity the beneficial effects of falling water are no longer confined to the riparian owners. The possible users of the energy of a stream are now practically unlimited.

This easy commercial carrying and diffusion of water power causes it to become State-wide and public in its nature. At present, it is a pressing and important governmental question in the State. This conservation and use of water power affects at the present time, the whole population of the State and not a mere fraction. Its proper use will multiply our manufacturing power, prevent loss to manufacturing communities, supply work

THE BUFFALO HISTORY MUSEUM

for the wage earners, eliminate destruction of forests by fire and farm lands by floods, improve the sanitary conditions, stimulate industry, facilitate transportation in trade — the whole resulting in increase of the material wealth and prosperity of the State.

The principle that it is a governmental function of the State of New York to conserve and improve its natural resources, is expressed in the First Annual Report of the Conservation Commission of the State of New York, submitted to the New York Legislature, January 10, 1912, at p. 26:

> "State sovereignty necessarily includes among its attributes authority to control and regulate the material resources provided by nature.
>
> "It may be asserted without fear of contradiction that water power is a paramount factor in the State's growth and prosperity; that the conservation of water in reservoirs and at head-waters, and regulation of the same, would result in a uniform flow, an increase of power, the protection of public and private property from damage by flood, the removal of a menace to public health and an improvement to navigation.
>
> "The State should own and regulate the disposition of whatever additional water power it may create, provide for the proper utilization thereof, and dispose of it at such reasonable charge as will yield a public revenue, stimulate the development of industries and afford greater opportunities for the wage-earner. If this cannot be accomplished, otherwise than by direct action of the State, then the State itself should develop and furnish power for the general benefit. In the initiation of a plan of conservation, the future should be amply provided for, and every precaution essential to present and future interests of the people of the State should be taken. Legitimate investments of private capital should be properly protected.
>
> "From time to time laws have been enacted permitting leases of the surplus of the canal system, but by reason of limitations surrounding the same, the revenue derived therefrom was nominal and the opportunity for power develop-

THE BUFFALO HISTORY MUSEUM

ment was slight. Substantially all these leases have been terminated, and the few remaining in force should be terminated as early as practicable.

"When the barge canal is completed, the quantity of surplus canal water will be materially increased. It is conservatively estimated that it will then be sufficient to develop at least 50,000 horse power without injury to navigation.

"The surplus water of the canals is unquestionably owned by the State. The State should not permit so valuable a resource to be wasted, or utilized without adequate return."

The practical situation now exists that water power has been developed to its maximum through private interests, but through State regulation such water power can be increased and made available to all the citizens of the State upon equal opportunity. There can be no doubt but that such natural resources must be regarded as common property, which require for their full beneficial enjoyment by the various citizens of the State, regulation and control by the State itself, as a proper part of its governmental duties and functions.

On this view it is urged that no violation would be made of the exercise of the right of eminent domain in securing the title of riparian owners to water power structures now owned and erected by them, and that such exercise of the right of eminent domain would not violate section 6, article 1 of the Constitution, which provides, among other things:

"No person * * * shall be deprived of life, liberty or property without due process of law. Nor shall private property be taken for public use without just compensation."

It may be contended that the conservation of water power by the State itself for the purpose of thereafter selling or leasing the same to private individuals is as a matter of fact and logic not strictly and wholly a public use of the conserved water powers but rather a private use and that, consequently, being a private and not a public use, the State would have no authority to exercise its right of eminent domain. Such a contention, if true, would not permit the inference or conclusion that consequently,

THE BUFFALO HISTORY MUSEUM

the Federal Government would have the right to appropriate and confiscate such material and natural resources of the State.

The suggestion that the use is private would be readily obviated by an amendment to the State Constitution. It is a power lodged with the people of the sovereign State of New York, which was never delegated as one of the enumerated powers by the State of New York to the government of the Union.

That the people of the State of New York have the power and right to so amend their Constitution as to permit of the exercise of eminent domain by the State in the securing of private property for at least quasi-private purposes is beyond dispute, because as a matter of fact such amendments to the New York State Constitution have already been made in several respects. Article 1, section 7 of the Constitution permits the opening of private roads through the use of eminent domain.

In 1894, a provision was added to article 1, section 7 of the Constitution that authorized the exercise of eminent domain in and about the drainage of agricultural lands. Although this might be argued to be a private use, the Constitution was amended on the ground that it was a proper function of the government in promoting the public welfare.

And, further, on January 29, 1912, a joint committee of the Legislature of the State of New York, on the conservation of water, made its report and made suggestion that if deemed necessary, the Constitution of the State of New York should be amended in this very particular and that such proposed amendment should read as follows:

> "That the development of the water power of the state is a proper governmental function and that private property may be taken therefor upon just compensation being made." (See p. 82 of said report.)

Thus, it is urged, that the creation and sale or other use of water power is an appropriate governmental function, to be exercised by the State, which was never ceded to the National Government; that the State has a right to acquire, if necessary, such power sites now in the possession of individual owners through the exercise of the power of eminent domain.

THE BUFFALO HISTORY MUSEUM

The Character of the State's Title in Navigable Streams.

But in the State of New York, the title to the bed of navigable streams, to the waters therein and to lands under tide waters, is in the State, as trustee for the public at large. This title is not a mere naked title, but is such title as *includes* the beneficial use of the water in the stream which has not already been appropriated by private citizens, and if so appropriated, is liable to be resumed by the State through its power of eminent domain.

People v. *Tibbetts,* 19 N. Y. 523.
People v. *N. Y. & S. I. Ferry Co.* (1877), 68 N. Y. 71.
Kerr v. *West Shore R. Co.* (1891), 127 N. Y. 269.
Saunders v. *N. Y. C. & H. R. R. Co.* (1894), 144 N. Y. 75.
People v. *Jessup,* 160 N. Y. 249, 256.
Matter of N. Y., 168 N. Y. 134.
Matter of N. Y., 182 N. Y. 361.
Knight v. *United Lands Association,* 142 U. S. 161.
Illinois R. R. Co. v. *People,* 146 U. S. 387.

In *Martin* v. *Waddell,* 16 Peters (41 U. S.), 366, the court held:

> " When the revolution took place, the people of each state became themselves sovereign; and in that character held the absolute right to all their navigable waters, and the soil under them, for their own common use, subject only to the right since surrendered by the constitution to the general government."

In *Pollard* v. *Hagen,* 3 How. (44 U. S.) 212, it was held:

> " The shores of navigable waters and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively; and the new states have the same rights, sovereignty, and jurisdiction over this subject as the original states."
>
> " The title and dominion of the states are qualified only by the prerogatives surrendered to the United States. The Federal Government has such interest in rivers to improve

THE BUFFALO HISTORY MUSEUM

their navigation that it can authorize the appropriation of the soil for bridge abutments incident to commerce and navigation." (Farnham on Waters and Water Rights, Vol. 1, p. 50.)

citing:

Decker v. *Baltimore & N. Y. R. R. Co.,* 30 Fed. 723.

The character of the State's title to the bed of navigable rivers and the waters therein is clearly stated in the case of

People v. *N. Y. & S. I. Ferry Co.,* 68 N. Y. 71.

where the court says:

"The title to lands under tide waters within the realm of England were, by the Common Law, deemed to be vested in the King as a public trust, to subserve and protect the public right to use them as common highways for commerce, trade and intercourse. The King, by virtue of his proprietary interest could grant the soil so that it should become private property but his grant was subject to the paramount right of the public use of navigable waters, which he could neither destroy nor abridge. In every such grant there was an implied reservation of the public right and so far as it assumed to interfere with it or to confer a right to impede or obstruct navigation or to make an exclusive appropriation of the use of navigable waters, the grant was void."

To the same effect, see:

Hardin v. *Jordan,* 140 U. S. 371.
Barney v. *Keokuk,* 94 U. S. 324.

The proprietary right of the State is also very fully and accurately stated by Mr. Justice Field in

Illinois C. R. Co. v. *Illinois,* 146 U. S. 387.

as follows:

"The State holds the title to the lands under the navigable waters in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them and have liberty of fishing therein, freed from the

THE BUFFALO HISTORY MUSEUM

obstruction or interference of private parties. * * * The control of the State for the purposes of the trust can never be lost except as to such parcels as are used in promoting the interests of the public thereon or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. * * *

" The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace."

In *St. Anthony Falls Water Power Co.* v. *St. Paul Water Commissioners,* 168 U. S. 349, it was held:

" The provisions of the act of Congress, * * * making the Mississippi River a common highway for the inhabitants of the State and all other citizens of the United States, do not impair the title and jurisdiction of the State over the navigable waters within her boundaries more than rights of that nature are limited with regard to the original States. This has been uniformly held, and is so stated in many of the cases hereinafter cited where similar language has been used in the acts admitting States into the Union."

In this case many prior decisions upon the subject are quoted. In *Kansas* v. *Colorado,* 206 U. S. 46, it was held:

" The Government of the United States is one of enumerated powers; that it has no inherent powers of sovereignty; that the enumeration of the powers granted is to be found in the Constitution of the United States, and in that alone; that the manifest purpose of the Tenth Amendment to the Constitution is to put beyond dispute the proposition that all powers not granted are reserved to the people, and that if in the changes of the years further powers ought to be possessed by

THE BUFFALO HISTORY MUSEUM

> Congress they must be obtained by a new grant from the people. While Congress has general legislative jurisdiction over the Territories and may control the flow of waters in their streams, it has no power to control a like flow within the limits of a State except to preserve or improve the navigability of the stream; that the full control over those waters is, subject to the exception named, vested in the State."

It being established that the title to the waters and the land covered by them is in the State, they form a part of its domain and its laws are binding thereon except so far as they may conflict with laws which have been enacted by Congress within the limits of the constitutional authority of that body.

People v. *Welch*, 141 N. Y. 266.
Delaware & H. Canal Co. v. *Lawrence*, 2 Hun, 163.

That the State may exact a reasonable compensation for the facilities afforded by improvements from all making use of them is acknowledged by the Supreme Court. So long as no discrimination is made against citizens of other states in favor of her own, the exercise of this power is not in violation of the Federal Constitution. The improvement may include the construction of locks and dams.

Heese v. *Glover*, 119 U. S. 543.

The Proprietary Rights of Riparian Owners are Measured by the Decisions of the State Courts.

Water Power Co. v. *Water Commissioners* (1897), 168 U. S. 349,

and numerous cases cited.

The New York Courts hold that the State, owning the water way in a navigable stream may divert the water therefrom for supplying its canals without liability to the riparian owners along the stream:

People ex rel. Loomis v. *Canal Appraisers*, 33 N. Y. 467.

THE BUFFALO HISTORY MUSEUM

The Loomis case (*supra*) has been followed in

Black River Imp. Co. v. *LaCrosse Boom & Trans. Co.*, 54 Wis. 659.

Homochitto River v. *Withers*, 29 Miss. 21.

Patent Power Co. v. *Kaukauna Water Pr. Co.*, 28 L. R. A. 443 (Wis.).

The doctrine has been carried in New York to the extent that all the waters belong to the State so that the riparian owner has no right to the power generated on his land but that the State may take the water elsewhere or compel him to pay for the use of surplus water which it did not need.

People v. *Tibbetts*, 19 N. Y. 523.

Crill v. *Rome*, 47 How. Pr. 398.

and to the same effect:

Cameron Furnace Co. v. *Penna Canal Co.*, 2 Pearson (Pa.), 208.

The State's Proprietary Rights in the Water Power of Boundary Waters.

The principle is well established that in the St. Lawrence and Niagara rivers, the ownership of the State of New York to the bed of the river and to the waters therein extends to the middle or dividing line of the rivers.

The land under the waters of the St. Lawrence and Niagara rivers became vested in the State as the successor of the Crown, for the common use and enjoyment of the public in the same manner as the bed of tidal streams.

Fulton Lt. Ht. Pr. Co. v. *N. Y.*, 65 Misc. 263; aff'd, 200 N. Y. 400.

Niagara Co. Irrigation Co. v. *College Hts. Co.*, 111 A. D. 770, 772.

Matter of State Reservation, 37 Hun, 537.

Section 5 of the State Law fixes the Canadian boundary at the point in question running westerly along the middle of the lake " to a point opposite the mouth of the Niagara river, thence to and

THE BUFFALO HISTORY MUSEUM

up the middle of the said river to the Great Falls; thence up the Falls through the point of the Horse Shoe, keeping to the west of Iris(h) or Goat Island, and of the group of small islands at its head, and following the bends of the river so as to enter the strait between Navy and Grand Islands;" same as in Decision of Commissioners dated June 18, 1822, made pursuant to sixth article of the Treaty of Ghent (Dec. 24, 1814)— except "Iris" is used in decision instead of "Irish" in the statute.

Grants of land on Niagara river, bounded by the stream, do not convey to beyond shore lands and do not include islands.

Matter of State Reservation, 16 Abb. N. C. 159.

Water power may be accrued by prescription — id.

The right of the State is a fee or proprietary right which includes, as an essential ingredient of such dominion and ownership, *the power to make available by use,* the energy of water power produced by the waters in said river. This undoubted proprietary right of the State is subject to but one limitation. That is, the limitation given to Congress by the Commerce Clause and also the right to make treaties with foreign nations.

In the Commerce Clause the Congress of the United States in regard to the said boundary rivers is limited to prohibiting the State of New York from diverting their waters to an extent which would render the waters above or below unnavigable. There can be no merit in the contention that any such quantity of water is or has been diverted from the Niagara river or the St. Lawrence river as to interfere in such sense with navigation or commerce. It must be admitted that the United States has the right to make treaties in regard to boundary lines with foreign countries, as well as to settle international disputes. On the assumption that there was a dispute between Canada and the United States in regard to how much water power should be extracted or diverted from the said boundary rivers, the Federal Government had a right to pass the Burton Act of 1906, which limited the amount of power or water that could be diverted from the Niagara river or the St. Lawrence river.

But further than this, the power of Congress does not go. Having placed a limit upon the amount of water power that can be used from the boundary rivers, no power is lodged in Congress

THE BUFFALO HISTORY MUSEUM

by the Constitution to sell, lease or otherwise dispose of such power for the benefit and revenue of the Federal Government. The sale or disposal of the stated quantity agreed upon between the contracting countries shall be and must be used and disposed of by the State of New York and by the Government of Canada.

The attempted exercise by the Federal Government of the unfounded right to prohibit the State of New York from leasing or disposing of this water power is clearly violative of and beyond any of the enumerated powers conceded to the Federal Government by the sovereign State of New York, whether in regard to commerce, navigation or otherwise. This view accords with the common sense of the situation. Enormous hydro-electric power can be generated by the waters of the St. Lawrence and Niagara rivers, which power by present mechanical means and processes can be readily transmitted and carried to every part of the entire State of New York. Such water power, so far reaching and general in its consequences to the entire citizenship of the State of New York is certainly one of the material resources which New York, as a sovereign state, never expressly nor by any fair implication, conceded in any wise to the Federal Government.

The proprietary rights of the State of New York in such waters must be that that State has a right to use all of the power permitted by Canada, with the single limitation that the State can not use, directly or indirectly, such an amount of water as would interfere with the navigation of the river or exceed the total aggregate amount of consumable power agreed upon by the treaty between the United States and Canada.

The Federal Government has no Right to Sell or Lease Surplus Power Created as an Incident to a Structure Made by the Federal Government for the Purpose of Improving Navigation or Assisting Commerce.

It is conceded that if surplus power is created by such an erection or structure, that sufficient of such power to operate in a proper manner, the erection, whether by a dam, bridge or other structure can be properly appropriated and used by the Federal Government.

A sale of any surplus thus created is in principle and practice

THE BUFFALO HISTORY MUSEUM

violative of the Federal Constitution and the reserved rights of the State. As a natural result, the United States seeks to secure a beneficial advantage from carrying out its governmental duties in improving a navigable river for the purpose of navigation and commerce. It seeks to secure a revenue by the use of the structure. It appropriates to itself the beneficial use which results from the flow of the natural water across the bed of the stream, which water and bed of the stream itself is owned by the State of New York or by the riparian owner.

It permits the government to go into the business of manufacturing and transmitting by electricity this water power to any customer anywhere. Thus, the Federal Government is entering into a business; it goes into competition with the citizens of the State and with the State itself. The State of New York has pledged itself by legislative enactments during the past fifteen years to a policy of conserving its natural resources and selling them for revenue to the citizens of the State.

It prevents the State of New York from properly reaching its full commercial efficiency and prosperity, and thus results indirectly in preventing the State from securing a revenue to run its government by taxation.

In short, such confiscation by the United States Government and active competition in the business of dispersing water power is no other than an effective interference and limitation upon the State's power of taxation.

The policy of the Federal Government has become fixed to the effect that the central government shall not undertake to secure a revenue or a profit for the use or operation of improvements made by the Federal Government in aid or in order to facilitate commerce and navigation. The present federal policy is clearly expressed in the very recent federal statute of the United States:

> "No tolls or operating charges whatever shall be levied upon or collected from any vessel, dredge or other water craft, for passing through any lock, canal, canalized river, or other work for the use or benefit of navigation, now belonging to the United States, or that may be hereafter acquired or constructed;"

THE BUFFALO HISTORY MUSEUM

and such cost of operating, preserving or continuing the use of such work shall be paid out of the treasury of the United States. Section 6. Act Feb. 27, 1911; 37 St. L. 956.

The State of New York is the owner of its natural resources and within its properly reserved powers has a constitutional right under the form of our government to exploit such of its property and secure a revenue from its use, which revenue would necessarily reduce the taxes required to be raised by the State government. Further, such conservation of natural resources by the State would increase the material prosperity of the State and so enlarge the property to be taxed for State purposes.

The State government has no right to tax any governmental agency of the United States government, nor has the United States government any right to either directly or indirectly tax any governmental agency or property of the State, except as permitted and allowed under the taxation clause of the United States Constitution.

The sale of such water power privileges is of vital interest to all the people of the State and from the taxpayers' standpoint, is a valuable vested property and governmental right of the State of New York, for the reason that it makes possible a large State revenue if this interest is protected and its resources are conserved.

Federal Expenditures Must be Reimbursed Exclusively Through Taxation.

There is no provision, however, expressly or by implication, contained in the Federal Constitution which requires the State or the citizens particularly benefited by the improvement to contribute directly to the cost thereof or to compensate the government for such structures. Reimbursement to the Federal Government, including improvements made to facilitate navigation are paid for through the power of taxation, which was granted by the States to the government. An appropriate ways and means having been provided by taxation for securing sufficient money to perform the functions of the Federal Government, it would seem to follow that all other means were reserved to the State. The Federal Government was never contemplated to have been created to make a profit at the expense of the natural resources of a State for carrying out its delegated governmental duties.

THE BUFFALO HISTORY MUSEUM

The function of taxation is to secure sufficient money to perform the delegated governmental functions. It is to be noted that this power of taxation was peculiarly and expressly limited and restricted as granted by the States to the Federal Government. See section 8, article 1, which reads as follows:

> "Section 8. The Congress shall have power to lay and collect taxes, duties, and imposts and excises to pay the *debts* and provide for the common defense and general welfare of the United States and all duties, imposts and excises shall be uniform throughout the United States."

Under this section taxes are of two kinds — direct and indirect. A direct tax cannot be levied directly by the Federal Government but must be apportioned among the States, leaving each State to make the collection. An impost or excise tax must be levied by the rule of uniformity as applied to dams and water power rights and a uniform rate would have to be levied and fixed for every such structure and right within the United States. See

Thomas v. *United States,* 192 U. S. 263.
Pollock v. *Farmers' Loan & Trust Co.,* 157 U. S. 557.

Under the power of taxation granted to the National Government no recoupment for expenditures in improvements are permitted by any special assessments. The national expenditures are reimbursed through taxation and not otherwise.

The Suggested Cases do not Sustain the Position Taken by the Federal Government.

The two cases cited, *Kaukauna Company* v. *Green Bay and Mississippi Canal Co.,* 142 U. S. 254, and *Green Bay and Mississippi Canal Co.* v. *Patten Paper Co.,* 172 U. S. 58, are not authority upon the question of the ownership and control of surplus water power created by improvement in navigable streams.

In the decision of *Green Bay & Mississippi Canal Co.* v. *Patten Paper Company,* no rights as between sovereign powers were in any way at stake. That case was an action to determine the rights in the flow of the Fix river. The Fix river, in the State of Wisconsin, is a navigable stream, but in order to improve its

THE BUFFALO HISTORY MUSEUM

navigation it became necessary, by reason of certain rapids and falls in the river, to improve the same. Wisconsin had been granted by the United States certain lands for the express purpose of such an improvement and they had been accepted by the State, and from funds created by a sale of the land, certain improvements were undertaken. The act of the State Legislature which authorized the improvements, expressly declared that the water power developed incident to the improvement belonged to the State of Wisconsin and was subject to the action of the State Legislature.

The land sales, not being sufficient to improve the river, certain certificates of indebtedness charged upon the revenues of the improvement, had been issued. The State failing in its enterprise, a corporation, the plaintiff herein, had been formed for the purpose of continuing the improvement and taking over all of the uncompleted work of the State, including the incidental water power. This corporation failed, and under proper legislation, the company, after an appraisement, transferred the work to the United States Government, retaining to itself the water power, and in the decision of the case, while there are some statements that look toward the proposition that the power incident to an improvement in a navigable river is under the control of the United States Government, such was not necessary to the decision of this case, as it is expressly stated in the case that the United States Government, if it had any rights in the matter, had consented to the retention of those rights by the plaintiff in the transfer from the plaintiff to the United States, and it reversed the judgment of the Wisconsin courts that had declared adversely to the plaintiff, and expressly recognized the rights of the plaintiff in this water power.

It will be noticed that in this case the original rights of the plaintiff were granted to it by the State of Wisconsin, and the State of Wisconsin, in the act which started the improvement, expressly declared that the incidental water power belonged to the State of Wisconsin.

In the other case *Kaukauna Company* v. *The Green Bay & Mississippi Canal Co.*, 142 U. S. 254, the same river improvements and water rights were involved; the difference in the cases

THE BUFFALO HISTORY MUSEUM

being that, in this case, the question was as between the rights of a riparian owner as against the canal company, and in the decision of that case, Justice Brown stated that the case of the plaintiff canal company depends primarily upon the legality of the legislative act, whereby the State has reserved to itself any water power which should be created by the erection of the dam across the river at this point, and that no question is made of the power of the State to construct or authorize the construction of this improvement; and in that case, it expressly recognizes the power of the State to retain to itself the surplus water powers and dispose of them, and that the United States Government can interfere in the matter only in the interest of navigation.

In neither one of these cases are there any rights discussed as between the sovereign state and the United States. The question is solely as to the rights existing between private interests, and it was not necessary, in either of these decisions, to in any way pass upon the rights that exist between a sovereign state and the Federal Government. In fact, in so far as the question is touched in either of the cases, the effect of the decision is to recognize the ownership in the State of the water power created incident to the improvement.

The Situation of the Troy Dam Improvement.

This structure impounds the waters of the Erie canal. These canalized waters, although part of the highway of commerce, are part of the artificially constructed water way, built at the expense of the State of New York and are not the waters of a natural running river. There never has been any question that the power created by the surplus of such impounded waters is the property of the State of New York to be used by it as it deems best in the interest of its citizens. This water power is wholly artificially created by the State of New York.

Before the government undertook the work at the Troy dam to replace the existing structure at a distance of 1,600 feet north of the present structure, there existed an artificially surplus water power which had been leased by the State of New York to various citizens. These leases contained a provision that the State of New York might cancel the same upon certain conditions and

THE BUFFALO HISTORY MUSEUM

resume its property rights in the impounded waters of the Erie canal.

The Canal Board, in November 1910, attempted to cancel the existing leases and resume such proprietary rights. Assuming their acts to be legal and the resumption sought to be obtained as having occurred, the situation is that the State of New York owns all the water power created by the impounded waters of the Erie canal.

Assume that the State has consented that the Federal Government replace the present dam by a new dam some distance north. There is no creation by the Federal Government of any water power at all. It is dealing with water absolutely owned by the State of New York.

The mere moving of the location of the existing dam can in no sense be deemed a creation of artificial water power but, in fact and substance, is nothing more than a change of place and situation, the water power always being in existence as a result of the fact that the State of New York *has built the Erie canal and collected therein more than sufficient water for the purposes of navigation on the said canal.*

There was but a change in the location or site of the dam. This mere change of location, the State of New York has always asserted could not destroy any vested rights for the use of the water power devoloped by the present dam, erected at the expense of the State.

The same position and conclusion was taken and held by the Federal Government itself. Document 719 (see p. 471, opinions of New York State Attorney-General, 1911):

> "In other words the change in location of the dam would not destroy any vested rights for the use of the power developed nor would such removal prevent the present users from continuing its use."

The suggestion in the Secretary of War's letter to Governor Dix, dated January 19, 1912, that the United States Government undertook the work on the *faith* that it should dispose of the surplus water seems without foundation. The Canal Board attempted to cancel the leases and resume ownership of the surplus

THE BUFFALO HISTORY MUSEUM

waters. Even granting for the purpose of argument, which as a matter of fact is denied, that the Canal Board could not thereafter rescind the cancellation of such water leases, etc., the fact of the resumption of the surplus water by the State gave notice to the Federal Government that the permission granted to it was only to erect a new dam at another place on condition and provided always that the *State* should have the use of the surplus water power which it had by action of the Canal Board in cancelling the leases, *resumed* as the proprietor thereof.

Section 8 of Article 7 of the New York State Constitution, prohibiting the sale of certain canals, does not prohibit the legislature from authorizing the Canal Board to sell surplus waters from the canal or feeders if such water could be spared without injury to canal navigation.

In re Comstock (1889), 25 N. Y. S. R. 611; Id. 5 N. Y. Supp. 874. Opinion by Mr. Justice Kennedy at Special Term.

Sweet v. *Syracuse* (1891), 129 N. Y. 316.

See also Lincoln's Constitutional History of New York, Vol. 4, p. 665.

Thus the State has a vested property right to sell such surplus waters.

The River and Harbor Bill (June 25, 1910) contains a proviso:

> "That the expenditure of the amounts herein and hereafter appropriated for said improvement (improvement of the Hudson at Troy) shall be subject to the conditions set forth in said document."

The document referred to was House Document 719 (61st Congress, Second Session).

That part of the document pertaining to the present inquiry is found printed upon pps. 471 and 472 of the opinions of the New York State Attorney-General for 1911.

An examination of this document, which is thus practically incorporated in the Congressional appropriation bill places it beyond dispute, that the conditions and purposes attempted to be performed and carried out by the Federal Government are wholly in excess of the constitutional powers of Congress.

THE BUFFALO HISTORY MUSEUM

On p. 471 of the New York State Attorney-General's opinions of 1911 the language of Document 719 suggests that "the Secretary of War should be authorized to purchase by condemnation, or otherwise * * * the real property necessary for the improvement." The Secretary of War should "also be authorized to grant leases or licenses for the use of surplus water for water power created by the dam at rates to be fixed by him, the leases to be limited to a period not exceeding twenty years."

The document then continues:

> "The Secretary of War * * * for the occupation of such land belonging to the United States on the Hudson as may be required for *power flumes or other industrial purposes* and to construct such work or works appertaining to the dam as may be necessary for the development and use of such water power."

The Secretary of War may thus acquire land, not for the purpose of erecting structures necessary to facilitate commerce and navigation, but for some other wholly and entirely different purpose. The language says that the purpose may be such "as may be required for power flumes or other industrial purposes."

Thus, solely for securing premises on which to erect structures for *power flumes*, the United States can condemn land. But it is not only for power flumes that such power is attempted to be lodged in the Secretary of War — he may also condemn lands and make leases, etc., for "other industrial purposes."

It takes but little imagination to conceive of the vast indefinite and undefined power thus attempted to be lodged with the Secretary of War. The expression for "other industrial purposes" is as vague and indefinite a grant of power as could be made even after a most careful study and choice of language so as to avoid any limit in the grant of powers sought to be conferred.

The Commerce Clause permits only of appropriations to be expended in structures and erections which are necessary for the improvement of navigation and commerce.

The Constitution is silent nor can any implication be made in regard to lodging with the Federal Government a power to acquire by the power of condemnation, lands within the State for the avowed purpose of erecting "power flumes" or for "other in-

THE BUFFALO HISTORY MUSEUM

dustrial purposes" and further to construct works appertaining to a dam as may be necessary for the development and use of such water power.

The supposed limitation that these works must not be "inconsistent with the requirements of navigation" (see p. 471) is wholly ineffective as the suggested limitation merely prohibits physical obstructions or impediments to the passage of the ordinary vehicles of transportation and commerce.

That the State of New York contemplated that no new water power was to be created by the Federal Government in the erection of this proposed new dam near Troy, seems placed beyond dispute by the conditions and provisions under which Congress made the appropriation and directed the construction under the Secretary of War.

Surplus Waters — Federal Government — Troy Dam.

The theory that the Federal Government has the right to dispose and sell the surplus water power of New York State is not within the enumerated powers granted to it by the United States Constitution, because:

(1) It is a government function belonging to the State of New York to conserve and make use of its natural resources, including the water power of its rivers, except to the extent that it can not impede commerce or navigation of navigable streams.

(2) The Federal Government is not authorized to engage in a business of manufacturing, transmitting, or selling electrical energy, whether at cost or for a profit.

(3) The Constitution merely permits regulation in the interest of navigation and commerce by the Federal Government. *Regulation* does not mean the *appropriation* or confiscation of the proprietary rights of a state in its natural resources.

(4) In so acting, the Federal Government attempts to enlarge the power of taxation granted to it by the states. Such appropriations of the State's natural resources would necessarily result in the diminution of the taxable property of the State, retard its commercial and material prosperity and lacks the uniformity required in all systems of Federal taxation.

(5) The Commerce Clause of the United States Constitution in

THE BUFFALO HISTORY MUSEUM

no way authorizes the appropriation by the Federal Government of the State's natural resources. It merely permits regulation of navigable waters to the extent necessary and requisite to advance and promote commerce and navigation. For reimbursement to the National Government for such improvement, the States have granted to the Federal Government a limited power of taxation.

(6) The contemplated confiscation of state property can not be justified as an act of conservation of natural resources by the Federal Government. The Federal Government is limited in its policy of conservation to conserving the national public domain. The territory within the geographical limits of the state, not ceded or owned by the United States, must be conserved by a policy inaugurated by and through means employed by the respective states and not by the Federal Government.

(7) The contemplated appropriation by the Federal Government shows an entire disregard for state rights in that it arrogates to the Federal Government the state's sovereign and proprietary rights and attempts, by unconstitutional legislation, to limit the full ownership and control which exclusively belongs to the State, subject only to the paramount right of the Federal Government to regulate commerce.

Conclusion.

Federal legislation affecting water powers, which either in terms or in effect exceeds the limited and specified purposes for which the Federal Government has the power to legislate and which goes beyond the exclusive sovereign power of control for the specific public purpose of navigation, is an usurpation by the Federal Government of sovereign and proprietary rights, not only of legislation, but of ownership and control, which belong to the State; it is not only an encroachment upon the rights and jurisdiction of the state, but it becomes also a direct encroachment upon and is repugnant to state policies, state laws and state grants, already declared and enacted by the state pursuant to and within the limits of the authority and power belonging under the Constitution, exclusively and alone to the state and not to the Federal Government.

Dated, February 6, 1912.

THOMAS CARMODY,
Attorney-General.

THE BUFFALO HISTORY MUSEUM

MEMORANDUM OF AUTHORITIES SUBMITTED TO THE COMMITTEE ON FOREIGN AFFAIRS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES ON BEHALF OF THE STATE OF NEW YORK BY THE ATTORNEY-GENERAL OF THE STATE OF NEW YORK.

The title of the Niagara river to its center and to the waters that pass over that portion of the river is in the State of New York and individual riparian owners. The use by the State or by the individual riparian owners is subject, first, to international regulation, and second, to Federal regulation.

It is unnecessary to discuss the control to be exercised by international action; this subject is regulated by treaty, and it is under the terms of that treaty that the State of New York asserts the rights it herein contends for. The only question here is one of Federal or State control over that portion of the water permitted to be diverted by the treaty between the United States government and Great Britain dated January 11, 1909, viz., 20,000 cubic feet per second. Great Britain by the treaty has released all the rights which that government had to that portion of the water.

The only necessity for congressional action after the ratification of the treaty was to release from the jurisdiction and control which the Federal government has in the river, solely for the purposes of navigation, commerce and possibly fortification. The State does not concede, strictly speaking, that any action is necessary on the part of the Federal government in order to permit the State or the riparian owners to use the full amount of water permitted to be diverted by the treaty.

The effect of the treaty is to permit the State of New York to assert its legal rights and those of its citizens to the water permitted to be released by the treaty.

Upon this subject the following elementary principles are advanced.

First. The authority of the Federal government over these waters arises solely from the power reserved to the Federal gov-

THE BUFFALO HISTORY MUSEUM

ernment by the Federal Constitution, viz.: To regulate commerce between the several States and foreign nations.

Second. This Federal authority is purely a sovereign power for a specific public use, and does not carry with it any proprietary sovereign right except to control navigation. All the title and interest in the river, other than this, belongs to the State of New York or to the individual riparian owners, or both, and the Federal government has no legal authority or power, either judicial or legislative, to fix or determine as between the State and an individual owner the limitations between State or individual ownership or control of this water-power.

The above propositions are well settled by numerous decisions of the United States Supreme Court. They are in harmony with the decisions of the highest court of the State of New York.

The leading case on the subject and which holds the principles above outlined is

Martin v. *Waddell,* 16 Pet. 367.

The Court there held that when the American Revolution was concluded the people of each State became sovereign, and in that character held the absolute right to all their navigable waters and the soils under them, for their own common use, subject only to the rights since surrendered by the Constitution to the general government. This right, as pointed out by the court, was the right to regulate commerce between the several States and foreign nations.

In *Pollard* v. *Hagan,* 3 How. 212, it was held that the shores of navigable waters and the soils under them were not granted by the Constitution of the United States, but were reserved to the States respectively. That was an Alabama case, and the court held, in addition to the above principle, that the new States had the same rights, sovereignty and jurisdiction in respect to the waters of navigable streams as the original thirteen States.

In *Barney* v. *Keokuk,* 94 U. S. 324, it was decided that the rights of riparian owners on the banks of the Mississippi river were subject to control and regulation by the laws of the States within which the lands were included. The opinion in that case

THE BUFFALO HISTORY MUSEUM

states that the great lakes and other navigable waters of the country above as well as below the flood of the tide are, in the strictest sense, entitled to the denomination of navigable waters, and amenable to admiralty jurisdiction, and that there is no sound reason for further adhering to the old rule as to the *proprietorship of the beds and shores of such water.* The court added that the proprietorship of the beds and shores of such waters properly belongs to the States by their inherent sovereignty.

In *Hardin* v. *Jordan,* 140 U. S. 371, the court said in speaking of the title to the shore and lands under the waters of navigable streams:

Such title being in the State, the lands are subject to State regulation and control, under the condition, however, of not interfering with the regulations which may be made by Congress with regard to public navigation and commerce. The court further said in the above case:

> " This right of the states to regulate and control the shores of tide waters and the land under them, is the same as that which is exercised by the Crown in England. In this country the same rule has been extended to our great navigable lakes, which are treated as inland seas; and also in some of the states, to navigable rivers, as the Mississippi, the Missouri, the Ohio, and in Pennsylvania to all the permanent rivers of the state, but it depends on the law of each State *to what and to what extent this prerogative of the State over the lands under water shall be exercised."*

This brings us to the precise question that is now involved in the proposed legislation, and is full authority for the contention of the State that the disposition to be made of the surplus waters allowed to be diverted from Niagara river *depends upon the laws of the State of New York,* and it is also for the State to decide to what extent this power shall extend over these waters.

The United States Supreme Court in *Water Power Co.* v. *Water Board,* 168 U. S. 358, reasserted the principle that *subject only to the Federal right of control under constitutional authority*

THE BUFFALO HISTORY MUSEUM

to regulate commerce, that all the rights of ownership and beneficial use in the beds and waters of navigable streams pass to the State. This is also held in the following cases:

St. L. v. *Rutz,* 138 U. S. 226, 242.
Kaukauna Water Power Co. v. *Green Bay & Miss. Canal Co.,* 142 U. S. 254.
St. Louis v. *Myers,* 113 U. S. 366.
Shively v. *Bowlby,* 152 U. S. 1.
Illinois Central Ry. v. *Illinois,* 146 U. S. 387.

In the latter case the court said:

> "That the State holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the State holds title to soils under tide water, by the common law, we have already shown, and that title necessarily carries with it control over the waters above them whenever lands are subjected to use."

In *Kansas* v. *Colorado,* 206 U. S. 46, the United States Supreme Court covered in unmistakable language the whole subject involved in this litigation. It held that:

> "The Government of the United States is one of enumerated powers; that it has no inherent powers or sovereignty; that the enumeration of the powers granted is to be found in the Constitution of the United States and in that alone; that the manifest purpose of the tenth amendment to the Constitution is to put beyond dispute the proposition that all powers not granted are reserved to the people, and that if, in the changes of the years further powers ought to be possessed by Congress, they must be obtained by a new grant from the people. While Congress has general legislative jurisdiction over the territories and may control the flow of waters in their streams, *it has no power to control a like flow within the limits of a State, except to preserve or improve the navigability of the stream; that the full control over those waters is, subject to the exception named, vested in the State.*"

THE BUFFALO HISTORY MUSEUM

The tenth amendment, to which the court refers above, is as follows:

> "The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

Nowhere in the Constitution of the United States is the Federal Government given any power to dispose of the surplus waters of navigable streams or to control the development of electrical energy or to control the transmission into the State of electrical power, such as the proposed bill provides for. This bill, therefore, is not only directly antagonistic to an unbroken line of decisions in the United States Supreme Court, but it is antagonistic to the Federal Constitution in that it asserts a power of the Federal Government which the Constitution does not give and which the United States Supreme Court has repeatedly pointed out, belongs therefore to the respective States. The bill is, therefore, a usurpation of the sovereign authority of the State of New York. It destroys the property rights of the State and of its citizens without any color of legal right.

It is significant that the decisions of the highest courts of the State of New York are in harmony with the decisions of the United States Supreme Court above outlined.

In *Sweet* v. *The City of Syracuse,* 129 N. Y. 316, the court recognized as undisputed the doctrine that the State owned the soil of the bed of the navigable lakes within the State, and that this ownership is subject to every easement and servitude necessary to the use of the waters by other riparian owners, so far as they may be entitled to use the same. The court further held as follows:

> "Neither sovereign nor subject can acquire anything more than a mere usufructuary right therein, and in this case the state never acquired, or could acquire, the ownership of the aggregated drops that comprised the mass of flowing water in the lake and outlet, *though it could and did acquire the right to its use.* These propositions have been often stated by jurists and in judicial decisions in different forms, but it is believed that they all concur in the same general result."

THE BUFFALO HISTORY MUSEUM

The court here was speaking about Skaneateles Lake, a navigable body of water. This lake is subject to precisely the same Federal control as is that portion of the Niagara River which lies within the boundaries of the State, and of which we are speaking. In fact, the Federal Government has the same power to control the diversion of water from Seneca Lake, Keuka Lake, Oneida Lake or any of the other inland lakes of the State of New York, and from the Mohawk River, the Hudson River, or any of the other navigable rivers of the State, that it has over that portion of the waters of Niagara River that lies within the boundaries of the State. I assume that no one would argue that the Federal Government could grant permits to private individuals in defiance of the riparian rights of the State and of individual riparian owners to use the water from these lakes or rivers for power purposes. Yet I repeat, it has the same right in respect to those waters that it has in respect to the water in Niagara River covered by this proposed legislation.

In view of these plain provisions of law, supported by constitutional sanction and by the sanction of the highest court in the nation, supported also by proprietary right and by the sacred rights of private property, it is interesting to consider the provisions of this bill. In the first place, the title of the bill is a challenge and a violation of all of the rights involved. The bill is entitled "For the Control and Regulation of the Waters of Niagara River in the State of New York, for the Preservation of Niagara Falls and for other purposes."

It is needless to say that there is no power found in the Federal Government "for the preservation of Niagara Falls for other purposes," except for the purpose of navigation and for military defense. The cases heretofore cited support this statement and need not be repeated here.

The provisions of the bill seek to carry its title by first providing "That the diversion of waters from the Niagara River in the State of New York is hereby prohibited, except with the consent of the Secretary of War, as herein authorized by this act."

This is a plain denial of the State rights and of the rights of riparian owners in the river, as it asserts Federal control, not for purposes of navigation, but for purposes of determining *the per-*

THE BUFFALO HISTORY MUSEUM

sons to whom and the restrictions under which water is permitted to be diverted from the river.

The bill further provides that when the Secretary of War is satisfied that the diversion provided for "interferes with the navigable capacity of said river or its proper volume as a boundary stream or its sufficiency as a national defense, or *the scenic grandeur of Niagara Falls or that the waters diverted for the development of electric power are not being utilized to their full capacity for the proper standard of efficiency or that the public interests are not being served or protected in the use, transmission or sale of the electric power transmitted therefrom, he shall revoke any permit granted, after giving five years' notice to the said parties holding such permits and to the Congress of the United States, of the intention to make such revocation.*" This, therefore, asserts the right of the Federal Government through the Secretary of War, in violation of the constitutional powers of the Federal Government to decide in what manner the waters may be best utilized to develop their full and proper standard of efficiency, and to consider further questions entirely commercial or proprietary as the basis for cancellation of the permits. In other words, the Secretary of War is given the authority to decide who among the riparian owners within the State, or even those who are not riparian owners, can make the most effective use of the water diverted. This does not take into account the riparian rights at all, but permits them to be sacrificed in the interest of industrial efficiency, left entirely for decision to the discretion of the Secretary of War. If a more complete usurpation of sovereign or property rights could possibly be arrogated by the Federal Government than is provided for in the language of this bill, it is impossible to imagine it. There are several provisions of the bill no worse than this perhaps in respect to usurped rights, but which show a clear purpose on behalf of those who favor the bill of entirely ignoring every State and individual right, up to this time sacredly maintained in our courts. For instance, it is provided that all persons holding permits for the diversion of water from Niagara River for the purpose of creating electrical energy, shall, if necessary, reconstruct the plants now operating, within five years after notice by the Secretary of War, if such

THE BUFFALO HISTORY MUSEUM

plant is not constructed so as to use the water at its full or proper standard of efficiency, etc.

The Secretary of War is also authorized to grant permits for the transmission of electric power from the Dominion of Canada into the United States, and he is given power to specify the companies, corporations or bodies legally organized therefor, by whom the same shall be transmitted, and the companies, corporations or bodies to whom the same shall be delivered. This is subject to the approval of the Governor of the State into which the power is transmitted. This qualification, however, hardly mitigates the indefensive manner in which the State's rights are usurped.

The most offensive portion of the bill, however, is that which places in the discretion of the Secretary of War the right to determine whether or not under permits heretofore granted electric power transmitted from Canada into the States is being utilized, distributed or sold with due regard to public interest. The bill also limits the amount to be transmitted as 200,000 horsepower.

There cannot be found in the Federal Constitution a vestige of authority, either for permitting the Secretary of War to determine the question as to the efficiency with which the power is being used, the persons who are entitled to it or the manner in which it may be utilized, nor is there any authority in the Federal Constitution for limiting the amount of electric power that may be transmitted from Canada into the States. The Federal Government may impose a tax upon electric power under section 8 of article I of the Constitution, which authorizes the laying and collecting of taxes, duties, imposts and excises and also authorizes the regulation of commerce with foreign nations and among the several States. It need not be necessary to contend that under these provisions favored persons or corporations cannot be selected as the recipients of Federal favor, nor to argue that international commerce can be restricted in the discretion of the Secretary of War, so as to make it a matter of volition with him as to what persons or corporations are permitted to enjoy the privilege of transmitting their property into the States, or into what States or in what amounts they may be permitted to enjoy this privilege. The principle announced under the first point disposes of this question, viz.: That the power to do this must be

THE BUFFALO HISTORY MUSEUM

found in the Constitution or it does not exist. It is not found in the Constitution, therefore it does not exist.

New York contends for the principle set forth in the proposed bill, which was filed by the Attorney-General with the Committee on Foreign Affairs, and which is appended.

All of which is respectfully submitted.

Dated, February 15, 1913.

THOMAS CARMODY,
Attorney-General.

A Bill to Give Effect to the Fifth Article of the Treaty Between the United States and Great Britain, Signed January Eleventh, Nineteen Hundred and Nine.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:

That in order to give effect to the fifth article of the treaty between the United States and Great Britain, signed January eleventh, nineteen hundred and nine, the United States hereby authorizes and permits the diversion within the State of New York of the waters of Niagara River above the falls of Niagara, for power purposes, not exceeding in the aggregate a daily diversion at the rate of twenty thousand cubic feet of water per second.

Provided, however, that no water shall be diverted from said river at said point for power purposes except pursuant to written permits signed by the Secretary of War, who is hereby authorized and directed to issue such permits for the making of such diversion to said amount, to the State of New York, upon application made therefor by its officials, thereunto duly authorized.

Troy Dam.

Surplus water power should not be surrendered to Federal Government.

June 25, 1913.

Hon. William Sulzer, *Governor of the State of New York, Albany, N. Y.:*

My Dear Governor.— Mr. Connor and Mr. McCormick of Troy called on me recently, suggesting that something be done by

THE BUFFALO HISTORY MUSEUM

the State of New York, maintaining the State's former position with respect to the Troy dam, and opposing the attitude of the Federal government as outlined in the letter of the Secretary of War to you, of date June 8, 1913. They afterward conferred with you and returned, saying that you desired some suggestion from me as to the proper way of relieving the appropriation from the present conditions, which conditions, in the estimation of the Secretary of War in his letter of June 8th, constitute one of the grounds for his refusal to recognize the position taken by the State.

The appropriation was made in the following terms:

"(H. R. 20686.)

Improving Hudson River, New York: For maintenance and continuing improvement in accordance with the report submitted in House Document Numbered Seven hundred and nineteen, Sixty-first Congress, second session, and with a view to completing said improvement within a period of four years, one million three hundred and fifty thousand dollars: *Provided: That* the expenditure of the amounts herein and hereafter appropriated shall be subject to the conditions set forth in said document: *Provided further*, That the general plan for the improvement presented in said document shall be subject to such modification as to the location of the dam and in matters of detail as may be recommended by the Chief of Engineers and approved by the Secretary of War."

The first proviso should be eliminated so as to permit the Federal government to expend the appropriation freed from these conditions. The conditions are set forth in the report of Col. W. M. Black of the Corps of Engineers of the War Department, transmitted to the War Department on January 10, 1910, and printed in House Document No. 719, Sixty-first Congress, second session, to the effect that the State should surrender its riparian rights at the dam thereby surrendering its ownership and control of the surplus waters developed by the construction of the new dam.

I insist that these conditions are based on an erroneous conception of the law. The State cannot surrender these valuable rights, and any attempt it has made in the past to do so is without legal authority. I have frequently so advised the War Department, but it adheres to the report of Colonel Black and does not seem to be willing to take up the legal phase of the case and pass upon it.

We cannot, of course, prevent the improvement of the Hudson river by the government in the interests of navigation; we cannot prevent the Federal government doing what it deems to be best in the interests of navigation, and if it desires to locate the dam at

THE BUFFALO HISTORY MUSEUM

any particular place, or to place any particular kind of dam or other structure in the river at any place, the Federal government has the authority, under the commerce clause of the Federal Constitution, so to do.

But I insist that the resultant power which may be disposed of for compensation belongs absolutely to the State. Therefore, I suggest that the proviso in the appropriation to the effect that the State surrender its riparian rights (and that is the meaning of the first proviso), should be stricken out.

I would suggest that if you desire to communicate with Congress with respect to this appropriation, the communications should be substantially as follows:

"The State of New York objects to the construction on the part of the Federal government of the Troy dam with a view to enjoying the revenues derived from the surplus water power resulting from such construction, and suggests that the terms of the appropriation for dredging the Hudson River be so amended as to strike therefrom the following condition: '*Provided*, That the expenditure of the amounts herein and hereafter appropriated for said improvement shall be subject to the conditions set forth in said document:'.

"This proviso refers to the recommendation of Colonel W. M. Black of the Corps of Engineers of the War Department, transmitted to the War Department on January 10, 1910, and printed in House Document numbered seven hundred and nineteen, Sixty-first Congress, second session, to the effect that the State surrender its riparian rights and its control over the dam and the surplus water developed by the construction of a new dam, said report recommending the extermination of these riparian rights for the purpose of giving to the Federal government the ownership and control of the surplus waters.

"The Secretary of War takes the position that so long as this condition remains in the appropriation it must be observed, and the State of New York must surrender its riparian rights in the Hudson River at that point.

"The State protests against this as an invasion of the rights of the State, and asks that the appropriation be so amended as not to pledge the Federal government to the maintenance of a position in hostility to the rights of the State."

Very respectfully,

THOMAS CARMODY,

Attorney-General.

OSWEGO RIVER — SURPLUS WATERS — DISPOSITION OF.

Report of the Attorney-General relative to claim of the city of Oswego to surplus waters in the Oswego river, the State's right to erect gates and estoppel from disposing of waters.

On the 6th day of February, 1913, the Canal Board adopted a resolution providing as follows: "That the State Engineer and

THE BUFFALO HISTORY MUSEUM

Surveyor be directed to prepare plans and alterations in the contract for dam No. 6 on the Oswego river, so that the proper power development may be made possible alongside the lock on the easterly bank of the river at that location.

Thereafter, the city of Oswego petitioned this Board to rescind said resolution, and after hearings were had in which the city of Oswego appeared in support of its request for the rescission of said resolution, by Edwin J. Mizen, Esq., City Attorney, and John D. Higgins, Esq., and the Battle Island Power Company appeared in support of the resolution by George W. Driscoll, Esq., and W. P. Gannon, Esq., both parties filing briefs, the matter was referred by resolution to the Attorney-General for report to this Board.

REPORT.

Pursuant to said resolution, and after examining the briefs filed by the respective parties, I have the honor to report as follows:

1st. That the claim of the city of Oswego, that it is entitled to the entire surplus flow of the Oswego river at the new high dam, is not well taken.

2d. That the State is under a contract or other obligation to refrain from the erection of gates at the point in question, as claimed by the city of Oswego, is not well taken.

3d. That the State is estopped from disposing of the surplus waters of the Oswego river on the easterly side thereof, at the point where it was proposed by the resolution referred to to make alterations in the contract for dam No. 6, is not well taken.

I am of the opinion, however, that in view of the fact that no State officer, board or body, is authorized at this time to make any provision for the disposal of such waters at this point, it is inadvisable to expend the money necessary for the construction of head gates at this point. I am informed that the construction of such gates will involve the expenditure of about forty thousand dollars and that the cost of construction at a later date will not be very much in excess of this amount. The existing law (section 16, Barge Canal Law) prohibits the sale, lease or disposal by the State of the surplus waters of the Oswego river and accordingly, everything considered, I am of the opinion that the appropriation of money for the purpose of making the change provided

THE BUFFALO HISTORY MUSEUM

for by the resolution of February 6, 1913, should be postponed until legislative authority is given to dispose of such surplus waters, at which time it may be determined whether or not it is wise to dispose of the waters at this particular point.

Accordingly, I advise that the resolution of February 6, 1913, be rescinded, with the express reservation that such rescission is not to be construed as an admission of the claims of the city of Oswego to the exclusive right to make use of the Oswego river at this point.

Dated, May 5, 1913.

THOMAS CARMODY,
Attorney-General.

To the Honorable the Canal Board.

Surplus Waters — Niagara Water Power.

Inasmuch as the Federal law known as the Burton Act has expired, legislation is needed for the protection of the scenic beauty of Niagara Falls and of the State's rights to the water power therein. Right of various private corporations to divert surplus waters discussed.

Report of the Attorney-General in the Matter of the Diversion of the Waters of Niagara River for Hydro-Electric Power.

REPORT.

To his Excellency, Governor Sulzer, *Albany, N. Y.:*

My Dear Governor Sulzer.— I believe that the situation in respect to the diversion and use of the waters from Niagara river for hydro-electric power, as at present permitted, should receive the prompt attention of the Legislature of the State of New York.

The title to the center of Niagara river, both in the bed of the stream and in the waters that pass over it, is in the State of New York, subject to such rights as individual riparian owners may have, and subject also to federal control in the interests of commerce, and for the purpose of protecting the navigability of the stream.

I believe that federal control under the Constitution is limited to these two purposes, and that the federal government has not power to regulate the diversion of water for power purposes, or

THE BUFFALO HISTORY MUSEUM

for any purpose other than that expressly given it in the federal Constitution.

On January 11, 1909, the United States government and Great Britain entered into a treaty for the purpose of regulating the diversion of water from the Niagara river, which treaty permitted a diversion not to exceed twenty thousand cubic feet per second on the American side of the river. The federal government, pursuant to the terms of this treaty, enacted a law known as the Burton Act, which prohibited a diversion in excess of fifteen thousand six hundred cubic feet per second, and which empowered the Secretary of War to issue permits under the limitations of this act for the use of the waters of the river for power purposes. Pursuant to this power, the Secretary of War issued a permit to the Niagara Falls Power Company and to the Hydraulic Power Company of Niagara Falls, permitting the former to divert eight thousand six hundred cubic feet per second, and the latter, six thousand five hundred cubic feet per second; aggregating a total of fifteen thousand one hundred cubic feet per second, or five hundred cubic feet per second less than the diversion permitted by the Burton Act.

The State of New York has, during the past two years, vigorously opposed the principle of federal control as embodied in the Burton Act, and was represented before the committee on Foreign Affairs in Congress repeatedly in opposition to the extension of that act, which expired on March 4, 1913; since which time there has been no federal control of the diversion of the waters of Niagara river, unless the permits issued under the Burton Act are still valid, which I do not believe.

An investigation of this matter was made by Colonel Lucas, employed as consulting engineer by the Canal Board. I have his report before me, which is to the effect that since the expiration of the Burton Act the Niagara Falls Power Company has been using about ten thousand five hundred cubic feet of water per second, and the Hydraulic Power Company of Niagara Falls about nine thousand five hundred cubic feet per second, or a total diversion of twenty thousand cubic feet per second, being the total amount permitted to be diverted from the river by the treaty between this country and Great Britain.

THE BUFFALO HISTORY MUSEUM

The report of Colonel Lucas as to the amount now being diverted is based upon admissions of the officers of the companies.

I submit for your consideration a brief memorandum of the facts and a discussion of the law applicable thereto, as I understand it.

The Hydraulic Power Company of Niagara Falls.

The Hydraulic Power Company takes water from the river and conducts it by a canal fourteen by one hundred feet, through the city of Niagara Falls for a distance of about one mile to its power plant, dropping the water in penstocks to the turbines below, securing a head of about two hundred and twelve feet.

I believe this diversion can not be legally made as a riparian owner. As such owner the company may have the right to use the water in front of its property for power or other purposes. But I do not think the right, if it exists, justifies the diversion of the water from the river as it is diverted by the canal used by the company, notwithstanding the fact that the water is returned to the river below the plant of the company.

In addition to its riparian rights, however, this company secured from the Legislature in 1896 (chapter 968) an act recognizing and confirming the right of the company to take, draw, use and lease and sell to others the waters of Niagara river for domestic, municipal, manufacturing, fire and sanitary purposes, and also to develop power therefrom for its own use and to lease and sell to others to use for manufacturing, heating, lighting and other business purposes; the quantity being limited and restricted to such amounts of water as may be drawn by means of the hydraulic canal of said company, which canal is limited to a width of one hundred feet and to a depth and slope sufficient to carry at all times a maximum uniform depth of fourteen feet of water. This act, however, provides that the rights therein granted and conferred shall not impair the practical navigation of Niagara river. This act recognizes an existing right but limits its exercise. It does not in express terms undertake to grant any right or powers to the company in addition to those theretofore appurtenant and exercised as riparian owner.

I believe, therefore, that whatever rights the company now has to divert water from the Niagara river, without passing upon the

THE BUFFALO HISTORY MUSEUM

validity, at this time, of the permits issued by the Secretary of War under the Burton Act, must be justified by its riparian ownership, and not by any grant from the Legislature.

Niagara Falls Power Company.

This company takes water from the river at a point south of the intake of the Hydraulic Company, and conducts it by surface canal to its power plant, which lies a hundred feet, or thereabouts, east of the river, dropping the water by penstocks about one hundred and thirty-six feet into the turbines, whence it is discharged below the falls by a subterranean tunnel running under the city of Niagara Falls.

This company has, from time to time, received from the Legislature grants which, if valid, are sufficient to authorize it to take water from the river for power purposes, and to generate power in the shape of electricity or otherwise. I am informed, however, that this company asserts its right to the diversion of those waters as riparian owner. The grant from the Legislature, chapter 513 of the Laws of 1892, limits the diversion of water to such an amount as shall be sufficient to produce two hundred thousand effective horsepower. The act also provides that the grant thereby made, as well as any former grant, shall not be considered as conferring an exclusive right, or any right to infringe upon the State Reservation, nor the right to obstruct navigation in the Niagara river.

As regards the company's riparian rights, I am of the opinion that this would not justify the diversion of the water out of the bed of the river to the distance that it is now diverted, notwithstanding the fact that it is afterwards returned to the river. The company must, therefore, be prepared to justify its use of the water under the legislative grants mentioned and under the permits issued by the Secretary of War. Inasmuch as the Burton Act has expired, under which the permits of the Secretary of War have been issued, I am not prepared to say that these permits have any further validity or that any diversion of water from the river can be justified under these permits.

Neither company pays the State any revenue. In this connection it is important to observe that the Canadian companies,

THE BUFFALO HISTORY MUSEUM

for diversion of the water from the Canadian side of the river, pay the following rentals:

$1.50 for each horsepower up to twenty thousand;
$1.00 for the next ten thousand horsepower;
$ .75 for the next ten thousand horsepower;
$ .50 for every horsepower thereafter.

Recommendations.

I believe it to be incumbent upon the State of New York to act promptly with a view to protecting the scenic grandeur of the Niagara river and its navigability. This the State may do in its sovereign right and capacity; and this the State should do in view of the fact that the Burton Act has expired and that express federal control over the diversion of waters from the river has thereby ceased.

I believe it to be the duty of the State to recognize the provisions of the treaty between this country and Great Britain, which prohibits the diversion on the American side of the river exceeding twenty thousand cubic feet per second. It is, indeed, probable that the limitation should be restricted to that established by the federal government in the Burton Act, namely to fifteen thousand six hundred cubic feet per second. At least, no diversion should be permitted, I believe, beyond that amount until a thorough examination of the matter indicates that the beauty of the falls would not be impaired by a diversion of a larger quantity of water.

Whether or not the companies at present using the waters of the Niagara river without compensation may be restrained from so doing, or whether or not the franchises heretofore granted by the State may be rescinded, are matters that may be attended to hereafter in the courts. Legislative action, however, I believe to be imperative at this time, along the lines above suggested.

It may not be wise for the State at this time to take any action that would adversely affect the property interests that have been acquired under the permits heretofore granted. In view of the fact, however, that these companies have received these enormous benefits without compensation, I suggest the advisability of imposing a special franchise tax upon the franchises received, or upon the profits of the companies, until such time as the State

THE BUFFALO HISTORY MUSEUM

shall have adopted a policy of dealing with the surplus waters of navigable streams.

All of which is respectfully submitted.

Dated, April 3, 1913.

THOMAS CARMODY,
Attorney-General.

STATE CLAIMS TITLE TO LANDS UNDER WATERS OF HUNTINGTON HARBOR.

STATE OF NEW YORK:

ATTORNEY-GENERAL'S OFFICE,

ALBANY, *April* 10, 1912.

BEFORE THE STANDING COMMITTEE ON THE HEARING OF REMONSTRANCES OF THE COMMISSIONERS OF THE LAND OFFICE.

In the Matter of the Application of George McKesson Brown for a Grant of Land Under the Waters of Huntington Harbor, Suffolk County, for Beneficial Enjoyment.

To the Commissioners of the Land Office:

GENTLEMEN.—This was originally an application for 2.901 acres within Huntington harbor adjacent to the applicant's uplands. It has since been modified by changing the side lines of the lands applied for by leaving a strip of land under water unapplied for adjoining the dock at the foot of a public road which forms the east boundary of applicant's uplands and reducing the area to 2.548 acres. The applicant presents a map of proposed improvements showing why the grant is asked to permit the erection of a permanent dock, boat house, ways and a sea wall, and also the maintenance of a float on the east side of the dock to allow launches and small boats to land. The applicant's uplands are of the area of about fifty-six acres, and Mr. Brown is expending a great deal of money in erecting a handsome country residence thereon, and also desires to improve his narrow water front to properly maintain his yacht and other boats and to reach navigable waters. A remonstrance to this application was filed by the town of Huntington, which town claims title to all the land under water of

THE BUFFALO HISTORY MUSEUM

Huntington harbor by virtue of colonial patents of 1666, 1668 and 1694, and denies that the State has any interest therein. No other special reason was urged against the making of the grant. The matter came on for hearing before your committee on March 5, 1912, wherein it appeared that the applicant had accepted a lease for twenty-five years, and paid rental thereon in advance in full of $625, from the town of a part of the lands under water applied for and the remonstrant urges this as creating an estoppel against Mr. Brown from denying the town's claim of title. There are no taxpayers or citizens who object to the grant.

Counsel for the town urged that its title to these lands under water was determined in the case of Lowndes v. Town of Huntington, 153 U. S. 1, on writ of error from our Supreme Court, which action was one brought by the town to determine the right of a nonresident to take oysters from Huntington Bay. The United States Supreme Court in this case after discussing the limits and bounds of the ancient colonial grants to the town, called particular attention to chapter 279 of the Laws of 1888, wherein all the right, title and interest of the State to the lands below low water mark of Huntington Bay were ceded to the town of Huntington, "*for the purpose of shellfish cultivation.* Provided, nothing in this act shall be held to interfere with the rights and powers of the Commissioners of the Land Office to grant all the right, title and interest of the State to lands under water in said bay, to the owners of adjacent uplands for purposes of commerce or beneficial enjoyment, and nothing herein contained shall be construed as interfering with the rights of riparian owners," and the United States Supreme Court cited with approval, the opinion of our Court of Appeals in the case of People v. Lowndes, 130 N. Y. 455, 461, wherein it was said, "If the *locus in quo* was not within the colonial patent or grant, it was the property of the State, and passed to the trustee of the town of Huntington by the legislative act of cession of May (1888), preceding the time of the alleged offense." That was a criminal action under section 441 of the Penal Code.

The United States Supreme Court did not hold that the title to the lands under water were acquired by the town under the colonial patents for they said, "Either the title to these submerged lands passed by virtue of the colonial grants to the town of Hunt-

THE BUFFALO HISTORY MUSEUM

ington, or else it was in the State of New York (Martin v. Waddell, 16 Peters 367; Pollard v. Hagan, 3 Howard 212; Shively v. Bowlby, 152 U. S. 1), and this act (ch. 279, L. 1888) whose validity seems not to be questioned, cedes all the right, title and interest of the State in these lands to the town, so far at least as is necessary for the purposes of oyster cultivation."

Counsel for the town also cited Robbins v. Ackerly, 91 N. Y. 98, which was another oyster trespass case in *Northport harbor,* in the town of Huntington, wherein the State was not a party, and it was held that the town had the authority under its colonial patent to control the fisheries therein.

The last above case was cited in People ex rel. Howell v. Jessup, 160 N. Y. 249, where Parker, Ch. J., in discussing the rights of the town of Southampton, Suffolk county, under its colonial grant to certain lands under water not navigable and where there was no ebb or flow of the tide held that the colonial government could not under the common law of England grant lands under navigable tide waters, as such lands were held by the King not for his own benefit, but in trust for the benefit of his subjects at large, who were entitled to the free use thereof for the purposes of navigation, subject to such regulations and restrictions as the Crown and Parliament might prescribe.

The claim of the town of Huntington has frequently been urged on its remonstrances to applications of riparian owners of lands under water in Huntington Bay, a body of water into which Huntington harbor empties. The Land Board has uniformly, however, overruled such remonstrances and grants were made.

The applicant urges that unless he gets a grant from the Land Board in addition to the lease he now holds from the town, he might be subjected to a penal liability if he erected his proposed dock, under section 1530 of the Penal Law, making it a crime for anyone to in any wise interfere with navigation in State waters and calls our attention to the indictment, trial and conviction thereunder of one Israel G. Hawkins, in Brookhaven, Suffolk county, in April and May, 1910, because of the maintenance of a bridge over a small creek, notwithstanding permission to erect and maintain said bridge had been given him by resolution of the town board.

The practical interpretation by the Legislature in the act of

THE BUFFALO HISTORY MUSEUM

1888 of the respective rights of the State and the town of Huntington and the continued practice of the Land Board in making grants such as is now sought, demands that the objections of the town be overruled.

We would therefore recommend that a grant be made to the applicant of the lands described in his amended map, "subject, however, to such rights as the town of Huntington may have under its colonial grants," and that the said lands be appraised.

Respectfully submitted,

THOMAS CARMODY,
Attorney-General.
JOHN J. KENNEDY,
State Treasurer,
J. S. BENSEL,
State Engineer and Surveyor.

Revocation Clause in Water Grants.

At a meeting of the Land Board held May 23, 1912, the matter of the revocation clause to be inserted in grants of land under water was referred to the Attorney-General for preparation of a new resolution.

On June 20, 1912, the Land Board adopted the following clause for insertion in future water grants: "This grant is made subject to revocation by the State, under its trust powers, for the benefit of the people of the State."

Objections to the form of this clause were made by attorneys for various applicants for grants of land under water and on April 1, 1913, the following opinion was given to the Land Board which was unanimously concurred in by the Board:

April 1, 1913.

In the Matter of the Application of the Tompkins Cove Stone Company, for a Grant of Land Under the Waters of the Hudson River, at Tompkins Cove, Rockland County, N. Y.

To the Commissioners of the Land Office:

GENTLEMEN.—An application was made in the above entitled proceeding for a modification of the following clause inserted in

THE BUFFALO HISTORY MUSEUM

the grant made by the Commissioners of the Land Office to the applicant:

"This grant is made subject to revocation by the State under its trust powers for the benefit of the People of the State."

This clause was inserted after careful consideration and under my advice by the Commissioners of the Land Office, on the 12th day of November, 1912. The applicant herein, through its attorneys, Warner, Wells & Kolb, made an oral request to me, sometime since, that this revocation clause be changed. I reached the conclusion, and so informed the attorneys for the applicant, that I was opposed to changing this clause.

The written memoranda submitted by the attorneys for the consideration of this Board, and which I have examined, suggests no legal objection to this revocation clause. I believe the revocation clause should be retained, if not in its present form at least in substance.

I have frequently advised the Commissioners of the Land Office that the State has not the power to grant irrevocable permits for the use of land under the waters of navigable streams. This question has often received the consideration of our courts and the courts have uniformly held that the right of the State in navigable streams is a sovereign right and not a proprietary right. It, therefore, has nothing to give but the use of the lands under waters of navigable streams, the title being in the people of the State, and any use or benefit which is granted by the State is subject to revocation in the interest of the people. The clause inserted in the grant expresses this legal principle. I believe it should be rigidly maintained.

Respectfully submitted,

THOMAS CARMODY,
Attorney-General.

THE BUFFALO HISTORY MUSEUM